



AN ARD-CHÚIRT
THE HIGH COURT

[2024] IEHC 171

THE HIGH COURT OF IRELAND

ORDER FOR A REFERENCE PURSUANT TO ARTICLE 267 OF THE TREATY ON
THE FUNCTIONING OF THE EUROPEAN UNION

MS. JUSTICE EGAN
22 MARCH 2024

Record No. 2019/6174P

BETWEEN

ALEJANDRO BLANCO

Plaintiff

-And-

CRIMINAL INJURIES COMPENSATION TRIBUNAL, THE MINISTER FOR
JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

Defendants

IDENTITY OF THE COURT MAKING THE REFERENCE

1. This reference is made by the High Court of Ireland (Ms. Justice Emily Egan) (“*the referring court*”). The main proceedings bear the record number **2019/6174P**.
2. The reference has been submitted by e-curia. In the event that it is necessary to communicate instead by way of post, the address is as follows: Principal Registrar, The High Court, Four Courts, Inns Quay, Dublin 7, Ireland.

IDENTITY OF THE PARTIES TO THE MAIN PROCEEDINGS

3. The Plaintiff is represented by Michael Lynn SC, Catherine Donnelly SC and Devina Brady BL of the Bar of Ireland instructed by MacGuill & Co. Solicitors with an address for service of Merchants House, 27/30 Merchant's Quay, Dublin 8 D08 K3KD, Ireland. The First to Fourth Named Defendants are represented by Miriam Reilly SC and Mark Finan BL of the Bar of Ireland instructed by the Chief State Solicitors Office with an address for service of Chief State Solicitor, Osmond House, Ship Street Little, Dublin 8, D08 V8C5; Ireland.

THE SUBJECT MATTER OF THE DISPUTE

4. The within proceedings (the "**Plenary Proceedings**") concern an application by the Plaintiff to the Criminal Injuries Compensation Tribunal (the "**Tribunal**") for compensation under the Scheme of Compensation for Personal Injuries Criminally Inflicted ("**the Scheme**").

5. The Scheme is a non-statutory mechanism by which the State presently gives effect to its obligations under Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (the "**Compensation Directive**")¹. The First Defendant, the Tribunal, is the body responsible for administering the Scheme in the State. The Second Defendant is a Government Department with responsibility for ensuring that the Scheme is operated effectively by the Tribunal. The Third Defendant is the juristic person answerable at law for the actions of the Second Defendant, its servants and/or agents. The Fourth Defendant is the law officer of the State designated by the Constitution of Ireland and is sued in his representative capacity. The First to Fourth Defendants shall be referred to herein as 'the Defendants' and/or 'the State'.

6. The issue in the Plenary Proceedings giving rise to the requirement for this Article 267 Reference is whether the exclusion from the Scheme of compensation for general damages, including pain and suffering, fails to vindicate the Plaintiff's right to fair and appropriate compensation under Article 12(2) of the Compensation Directive. All parties before the referring court are in agreement that an Article 267 Reference is required.

¹ Although the Scheme substantially pre-dates the Compensation Directive

MATERIAL BACKGROUND FACTS

The Assault

7. The Plaintiff, a qualified software engineer who was born in Spain was the victim of a serious criminal assault in Ireland on 12 July 2015 when he was attacked on the street outside his home by a group of people. Three individuals two of whom were juveniles were prosecuted and convicted of various offences arising from the assault. The Plaintiff has been unable to ascertain the identity of his juvenile assailants.

8. The Plaintiff suffered a significant and permanent eye injury and other injuries during the assault. Details of his injuries were outlined in the application to the Tribunal submitted on his behalf by his solicitor as follows:

The (Plaintiff) was set upon by a group of four persons, who kicked him heavily to the ground and thereafter continued to kick him while he was on the ground for approximately 20 minutes. The (Plaintiff) lost consciousness during the attack. He suffered several injuries to his eyes, including an orbital fracture to the bottom of his left eye, very close to the optic nerve. He had to undergo surgery on his eyes and has lost partial vision on his left eye. He now also suffers from double vision due to the displacement of eye muscle. The (Plaintiff)'s jawbone was fractured and his tooth chipped. He suffered a contusion to his left shoulder. He had to wear his left arm in a sling for some time and this arm remained partially immobilised. He also suffered injury to his waist and chest. The (Plaintiff) is also suffering from mental distress and anxiety as a result of the attack...

The (Plaintiff) is currently suffering from pain and partial loss of vision in his left eye. He continues to suffer double vision in both eyes, particularly after waking up in the morning. His left arm is still partially immobilised. He is also suffering continued mental distress and anxiety. His tooth remains chipped....

The (Plaintiff) was absent from work as a result of the incident ...

The (Plaintiff) was dismissed from his job and is currently unemployed.”²

The Plaintiff's Application under the Scheme

9. On 1 October 2015, the Plaintiff submitted an application for compensation to the Tribunal under the Scheme. On 14 February 2019, the Plaintiff was notified of the Decision of the Tribunal (the “**Decision**”) on foot of which he was awarded the sum of €645.65 as compensation under the Scheme (the “**Award**”).

10. The Decision stated *inter alia*:

² In the course of the Plenary Proceedings before the referring court, the plaintiff submitted three medical reports setting out further details of his injuries. These medical reports, which are admitted without formal proof by the Defendants, are at **Appendix I**.

“The (Plaintiff) suffered personal injuries and loss arising from a violent assault and beating on 12 July 2015 in Dublin City when he was attacked by a group, including juveniles, on the street outside his home, some of whom were charged with various offences. The (Plaintiff) has not been compensated to date.

The Tribunal is satisfied that the out-of-pocket expenses claimed are directly attributable to crimes of violence and the application comes within the terms of the General Scheme ...

The Tribunal notes that the (Plaintiff) has not claimed for expenses arising from dental injuries.

The Tribunal makes an ex gratia award of €645.62 in respect of the (Plaintiff) ’s out-of-pocket expenses directly attributable to the violent crimes complained of including those vouched.

The Tribunal is precluded under the Scheme from awarding cash stolen from the (Plaintiff) during the attack or compensation for other property loss or damage.”

11. The Tribunal’s letter dated 14 February 2019 did not include a breakdown of the Award and same was duly requested by the Plaintiff’s solicitors on 3 April 2019. By letter dated 10 April 2019, the Tribunal furnished the Plaintiff’s solicitors with a breakdown of the award, which was as follows:

<i>“Fee to replace driving licence</i>	<i>€44.20</i>
<i>Fee to replace spectacles</i>	<i>€339.00</i>
<i>Medicine</i>	<i>€28.82</i>
<i>Hospital</i>	<i>€100.00</i>
<i>Travel expenses</i>	<i>€133.63</i>
<i>Total</i>	<i>€645.65”</i>

12. The Plaintiff had only submitted expenses in the sum of €645.65 and the award therefore reflects the total claim advanced for out of pocket expenses. In accordance with the provisions of the Scheme, the Award was limited to the Plaintiff’s out-of-pocket expenses and did not provide any compensation for general damages, including pain and suffering, notwithstanding the significant and ongoing injuries sustained by him in the attack.

The Plenary Proceedings

13. The Plaintiff issued the Plenary Proceedings on 2 August 2019 seeking, *inter alia*:

- *A Declaration that the Scheme is incompatible with the State’s obligation under Council Directive 2004/80/EC of 29 April 2004 and/or Articles 1 and/or 3 and/or 4 and/or 7 and/or 9 of the Charter of Fundamental Rights in that it fails to provide for fair and appropriate compensation by reason of the exclusion of general damages, including pain and suffering from the Scheme.*

- *A Declaration that the Plaintiff, as a person who was the victim of crime whose rights to compensation the State was obliged to vindicate, is entitled to damages for pain and suffering.*

THE NATIONAL SCHEME

14. The Scheme is a non-statutory administrative scheme, funded by annual and limited cash grants, and is designed to pay compensation in appropriate cases to victims of criminally inflicted injuries.

15. The necessity for such a Scheme arose from the fact that victims of crime had no practicable and effective legal remedy available for their injuries (including that perpetrators may not be identifiable or may not have sufficient funds to pay damages if found liable in other proceedings). The historical background to the Scheme in 1974 involved terrorist bombings in Dublin in late 1972 and early 1973.

16. From 1 October 1972, persons who suffer injury as a result of a crime of violence within the jurisdiction of the Irish State, can apply to avail of the remedies provided under the Scheme. The Scheme was drafted with the intention that it would be comprehensible to a person with little or no legal knowledge and that a person, acting on his/her own behalf, could bring an application to the Tribunal without the necessity of legal assistance.

17. The Tribunal was set up on 8 May 1974 to administer the Scheme and to process applications at first instance and predates the Compensation Directive. The Scheme has been amended twice since its inception, in 1986 (which is the operative Scheme in the Plenary Proceedings³) and 2021⁴.

18. Paragraph 1 of the Scheme provides that a payment for compensation may be made in respect of personal injury “*where the injury is directly attributable to a crime of violence...*”. In its original configuration, the Scheme made provision for the payment of general damages, including pain and suffering, however this was removed in 1986 as it placed a strain on the State’s financial resources during a period of profound economic recession.

19. As amended in 1986, the Scheme allowed for the making of an ‘*ex gratia*’ payment to a victim by way of compensation. In particular, paragraph 6 thereof provided that

³ A Copy of the 1986 version of the Scheme is at **Appendix II**.

⁴ The 2021 Scheme is of no immediate relevance to the issues arising in these proceedings.

compensation will be awarded by the Tribunal on the basis of damages under the Civil Liability Act 1995 (as amended), except that compensation will not be payable:

- (a) *By way of exemplary, vindictive or aggravated damages;*
- (b) *In respect of the maintenance of any child born to any victim of a sexual offence;*
- (c) *In respect of loss or diminution of expectation of life;*
- (d) *Where the victim has died, for the benefit of the victim's estate; or*
- (e) *In so far as injuries sustained on or after 1st April, 1986 are concerned in respect of pain and suffering. (Emphasis added)*

20. The Scheme does not impose an upper limit on the compensation payable thereunder. Legal costs and expenses are not recoverable under the Scheme.

21. The primary dispute in the Plenary Proceedings relates to the exclusion of the payment of compensation for injuries sustained in respect of a victim's pain and suffering and its compatibility with Article 12(2) of the Compensation Directive.

LEGAL CONTEXT

European Union Law

The Compensation Directive

22. Article 12(2) of the Compensation Directive requires Member States to vindicate the rights of victims of intentional violent crime in both domestic and cross-border scenarios through the provision of "*fair and appropriate compensation*", in the following terms:

"All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims."

23. The Recitals to the Compensation Directive outline its underlying purposes as follows:

"(1) One of the objectives of the European Community is to abolish, as between Member States, obstacles to the free movement of persons and services."

(3) At its meeting in Tampere on 15 and 16 October 1999, the European Council called for the drawing-up of minimum standards on the protection of the victims of crime, in particular on crime victims' access to justice and their rights to compensation for damages, including legal costs...

(6) *Crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed.*

(7) *This Directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations, which should operate on the basis of Member States' schemes on compensation to victims of violent intentional crime, committed in their respective territories. Therefore, a compensation mechanism should be in place in all Member States...*

(10) *Crime victims will often not be able to obtain compensation from the offender, since the offender may lack the necessary means to satisfy a judgment on damages or because the offender cannot be identified or prosecuted."*

EU Caselaw

24. Article 12(2) of the Compensation Directive has received limited consideration by the CJEU. While there are no cases dealing directly and definitively with the primary issue in dispute in the Plenary Proceedings, i.e., whether and to what extent compensation must be provided for material and non-material loss or harm, including pain and suffering, the CJEU's recent decision in *Presidenza del Consiglio dei Ministri v. BV* (Case C129/19, EU:C:2020:566) provides useful guidance.

Fair and Appropriate Compensation

25. In *BV*, the referring court submitted a request for a preliminary reference asking *inter alia* whether a fixed rate of compensation of €4,800 granted to victims of sexual violence under Italy's scheme for compensation could be classified as '*fair and appropriate*' within the meaning of Article 12(2) of the Compensation Directive.

26. The CJEU held, that although the Compensation Directive did not preclude fixed rates of compensation, the fixed sum of €4,800 did not appear to correspond to '*fair and appropriate compensation*' within the meaning of Article 12(2). In reaching that decision, the CJEU set out the following principles:

- i.* Member States have a discretion as to the amount of compensation payable and the detailed arrangements for the determination of such compensation. (§§58 and 61)
- ii.* Compensation is to be paid by the competent authority in the Member State in the territory of which the crime was committed by means of a national scheme for

compensation “whose financial viability must be ensured in order to guarantee fair and appropriate compensation by any victim of violent intentional crime”. (§59)

- iii. ‘Fair and appropriate compensation’ for the purposes of Article 12(2) of the Compensation Directive does not necessarily correspond to the damages and interest which might be awarded against the perpetrator of that crime. That same amount of compensation “is not necessarily required to ensure the complete reparation of material and nonmaterial loss suffered by that victim”. (§60)

27. The CJEU also set out the following ‘relevant criteria’ for the interpretation of Article 12(2) of the Compensation which must be taken into account by Member States to ensure that victims of violent intentional crime are awarded ‘fair and appropriate’ compensation:

- i A Member State would exceed its discretion under Article 12(2) of the Compensation Directive “if the national provisions provided compensation to victims of violent intentional crime that was purely symbolic or manifestly insufficient having regard to the seriousness of the consequences, for those victims, of the crime committed”. (§63 -emphasis added)
- ii The compensation granted to victims under Article 12(2) of the Compensation Directive “represents a contribution to the reparation of material and non-material losses suffered by them”. (§64 – emphasis added)
- iii The contribution to the reparation of material and non-material losses “may be regarded as ‘fair and appropriate’ if it compensates, to an appropriate extent, the suffering to which those victims have been exposed”. (§64 – emphasis added)
- iv Article 12(2) of the Compensation Directive does not preclude the payment of fixed amounts of compensation if the amount is capable of being varied “in accordance with the nature of the violence suffered” in order to avoid an award that is “manifestly insufficient”. (§§65 and 66)
- v A fixed rate of compensation cannot be classified as ‘fair and appropriate’ if it fails to take into account the “seriousness of the consequences” for the victims, of the crime committed (§69).
- vi Compensation must represent “an appropriate contribution to the reparation of the material and non-material harm suffered”. (§69 – emphasis added)

28. In *BV*, the Advocate General observed that a different rationale and logic applied to the payment of compensation under this Directive to that applying to awards of compensation under national tort law. Under national tort law, a perpetrator is generally ordered to make full

reparation or restitution and the sum awarded ought to mirror, as closely as possible, the full compensation of loss, injury and harm suffered by the victim. However, the logic of the compensation provided pursuant to the Compensation Directive is by way of (generalised) public (monetary) assistance to crime victims which is not premised on some form of fault committed by the Member States' authorities.

29. In *BV*, the Advocate General further noted that although the requirement that compensation is '*fair and appropriate*', limits Member States' discretion, that limit is, nonetheless, notably a '*light touch*'. Therefore, the Compensation Directive undoubtedly affords Member States an element of discretion in the formulation of their respective compensation schemes. However, in the present case, the referring court questions whether Member States have the competence to limit the scope of their respective compensation schemes for victims of violent intentional crime to entirely exclude the payment of compensation for non-material loss, including pain and suffering.

Non-Material Loss or Harm

30. In *BV*, the CJEU did not elaborate as to what loss or harm might be considered '*non-material*'. To date, it appears that this has not been considered by the CJEU in the context of the Compensation Directive.

31. The term '*non-material*' damage has received some judicial consideration by the CJEU in cases where damage is sought under Article 340 of the TFEU and in a data protection context.

32. In *European Union (represented by the Court of Justice of the European Union) v Kendrion NV* (Case C-150/17, ECLI:EU:C:2018:612), a case involving an application for damages under Article 340 TFEU, the Advocate General considered the concept of non-material damage in some detail on page 12 of his Opinion. At §105 *et seq.*, the Advocate General stated:

105. "Compensation under Article 340 TFEU aims at restoring, as far as possible, the assets of the victim as they were before the unlawful conduct of the EU institution. Therefore, pecuniary losses which are a direct consequence of that conduct are normally to be compensated through the payment of a sum equal to those losses.

106. “However, that [calculation of a sum equal to losses] is impossible for losses which are non-pecuniary, or non-material. In most legal systems, the concept of ‘non-material’ damage refers to types of damage that are intangible and that cannot be easily given an economic value since there is, strictly speaking, no market value for them. Typical examples of such damage include pain and suffering, emotional distress, impairment of life or of relationships. In essence, it covers different forms of physical and/or psychological harm...”

“108. If pecuniary (and non-symbolic) compensation is considered the most appropriate form of reparation in a given case, it is not an easy task to quantify the sum to be awarded. The court having jurisdiction in such a case must estimate an amount that adequately reflects the injury suffered by the victim, without unduly punishing the author of the unlawful conduct. In the absence of obvious or generally accepted economic benchmarks, courts may only find guidance in general principles such as, for instance, fairness, justice and proportionality on the one hand, and predictability, legal certainty and equal treatment on the other.

109. It is thus unavoidable that, to determine the existence of non-material damage, to identify the best means to adequately compensate it and, where appropriate, to calculate the sum to be awarded, courts will enjoy significant leeway.”

33. In *UI v Austrian Post AG*, (C-300/21), the CJEU delivered its first judgment considering non-material damage in the context of Article 82 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (“the GDPR”). The CJEU noted that the GDPR did not contain any provision intended to define the rules on the assessment of damages to which a data subject would be entitled. Therefore, in the absence of rules of EU law governing the matter, it was for the legal system of each Member State to prescribe the detailed rules governing such actions and, in particular, the criteria for determining the extent of the compensation payable subject to compliance with the principles of equivalence and effectiveness. In *VB v Natsionalna Agentsia Za Prihodite* (Case C-340/21, ECLI:EU:C:2023:986), the CJEU confirmed that the concept of “non-material damage” encompasses a situation in which the data subject experiences a well-founded fear that some of his or her personal data may be subject to dissemination or misuse by third parties in the future.

34. On 20 April 2009, the Commission reported to the Council, the Parliament and the European Economic and Social Committee on the application of the Compensation Directive. The report contained the results of an examination of the then current stage of implementation of the Compensation Directive in Member States covering the period 1 January 2006 to 31 December 2008. The report noted, *inter alia*, that the vast majority of the Member States provide in their schemes for compensation for both personal injury and death and that a large

majority included disease and mental injury. It concluded that the national compensation schemes provided fair and appropriate compensation for victims and that there appeared to be a substantial degree of compliance across Member States.

Domestic Law

Domestic Legislation

35. The Scheme is not an instrument of statute. It is an administrative procedure pursuant to which victims of crime may apply for compensation from the State. It is acknowledged that it predates the Compensation Directive.

Domestic Caselaw

Relevant domestic caselaw considering whether there is a right to compensation for pain and suffering pursuant to the Compensation Directive

36. The decision of the CJEU in ***BV*** was considered in some detail by the Court of Appeal in Ireland in ***Doyle v The Criminal Injuries Compensation Tribunal & Ors.*** and ***Kelly v The Criminal Injuries Compensation Tribunal & Ors.*** [2020] IECA 342 (“**Doyle/Kelly**”). The appellants had challenged the Scheme on a number of grounds and argued *inter alia* that the exclusion of compensation for pain and suffering breached Article 12(2) of the Compensation Directive.

37. The appellants submitted that courts must be guided by the principles of equivalence and effectiveness and are mandated by the decision of the CJEU in ***BV*** to ensure that “*some account is taken of the seriousness of the consequences of the harm suffered by the victims*” of intentional crime by the inclusion of a power to make an award for general damages. The respondents argued that the CJEU’s findings on ‘*fair and appropriate*’ compensation (at §§58 and 61) ought to be read in the context of the Italian Scheme which provided for fixed rates of compensation. By contrast, the Scheme in Ireland has no upper limit and payments may be made for a range of out-of-pocket expenses, including future loss of earnings.

38. At §69, the Court of Appeal confirmed that “[t]here is no longer any doubt that the [Compensation] Directive does indeed confer an EU law right to compensation from the State” on victims of violent intentional crime.

39. Arising from the CJEU’s ‘important clarification’ as to the scope of the Compensation Directive and its confirmation of an EU law right to compensation, Ms. Justice Ní Raifeartaigh stated that it was necessary to consider *inter alia* the extent or scope of that right and “*in particular, the exclusion of compensation for pain and suffering from the Irish Scheme...*”.

40. The Court of Appeal observed that there were comments in the *BV* decision that were supportive of both the appellants’ and the respondents’ positions. Those comments which tended to favour the respondents’ positions were summarised as follows (at §129):

“References in the judgment to the discretion afforded to member states, the need to ensure financial viability of national schemes, the fact that compensation need not be the same as that which would be required of the actual perpetrator, that what is prohibited is something that is “purely symbolic” or “manifestly insufficient”, and the approval in principle of schemes that include a fixed-rate approach, all tend to support the State’s position.”

41. Insofar as the appellants’ position was concerned, the Court of Appeal noted the ‘repeated references’ in the *BV* judgment to both material and non-material loss and stated (at §129):

“However, the clear and repeated references to “non-material” as well as material loss might be thought to support the appellants’ view that compensation for pain and suffering cannot be entirely excluded from the outset.”

42. At §129, the Court of Appeal held as follows:

“I am of the view that the BV case offers much guidance on what constitutes “fair and appropriate” compensation, but it does not signal definitely whether a member state must provide some compensation for pain and suffering.” (Emphasis added)

43. The Court of Appeal held that, in order to resolve the issue as to whether the Scheme is required to provide for both special and general damages (material and non-material damages), it may be necessary for an Irish court to seek a preliminary reference, however it was not prepared to make such a reference in that case on *inter alia* prematurity grounds.

Relevant domestic caselaw considering “non-material” damage

44. The question as to what losses a victim of violent intentional crime must suffer in order for same to constitute ‘non-material’ damage has not been determined in Irish law. That is not surprising given the Scheme does not provide for the payment of such damages. It is noted however that the scope of *non-material*’ damage has received some judicial consideration from the Irish Circuit Court in a data protection context in recent times.

45. In *Kaminski v Ballymaguire Foods Limited* [2023] IECC 5, O’Connor J. was satisfied that the defendant’s breach of section 117 of the Data Protection Act 2018 and/or the GDPR had caused the plaintiff to suffer serious embarrassment and sleep loss and that he was entitled to an award for non-material damages. The Court outlined the factors likely to apply in assessing damages for non-material loss including the following:

“There is not a minimum threshold of seriousness required for a claim for non-material damage to exist. However, compensation for non-material damage does not cover “mere upset”.

There must be a link between the data infringement and the damages claimed.

If the damage is non-material, it must be genuine, and not speculative.

Damages must be proved. Supporting evidence is strongly desirable. Therefore, for example in a claim for damages for distress and anxiety, independent evidence is desirable such as for example a psychologist report or medical evidence....”

Relevant domestic case-law on the function and assessment of damages for pain and suffering

46. The function of general damages (or non-pecuniary damages) for pain and suffering was considered by the Irish Supreme Court decision in *Sinnott v Quinnsworth* [1984] ILRM 523 in which the Chief Justice stated as follows (at p.531):

“General damages are intended to represent fair and reasonable monetary compensation for the pain, suffering, inconvenience and loss of the pleasures of life which the injury has caused and will cause to the Plaintiff.”

47. In its consultation paper, “*Compensating the Victims of Crime*” (LRC CP-67/2022), the Law Reform Commission observes that it is open to the victim of any crime to litigate against the person who is alleged to have injured them, since a criminal offence will usually also amount to tortious wrongdoing such as the tort of assault and battery.

48. As regards, the assessment of the damages to be paid by the perpetrator, the Court of Criminal Appeal in *The People (DPP) v Lyons* [2014] IECCA 27 stated that:

“It is almost axiomatic that a person who, through criminal wrongdoing, inflicts injury or loss on another person, that he or she is separately and distinctly liable to pay full compensation in civil proceedings. It represents a civil liability independent of the criminal liability of the convicted person.”

49. Leaving aside the possibility of exemplary damages, the amount of damages liable to be paid by the perpetrator in respect of such tortious liability is likely to be determined with reference to the Personal Injury Guidelines adopted by the Judicial Council in 2021 which catalogue the level of damages, which it considered might fairly and justly be awarded in respect of varying types of personal injury.

50. In *DPP v Stephen Duffy* [2023] IESC 1, the Supreme Court noted the significance of the *BV* decision and stated, at §67:

“The [CJEU]Court also said “fair and appropriate” compensation for victims of crime did not necessarily have to be the same amount that an offender might be ordered to pay in full reparation. It was, rather, a contribution to the reparation of material and non-material losses suffered. Further, States were entitled to ensure that their schemes were financially viable. However, compensation awards must have regard to the seriousness of the consequences of the crime for the victim and could not be “purely symbolic or manifestly insufficient”.

NECESSITY FOR A REFERENCE TO COURT OF JUSTICE

51. In light of all of the above, it appears to the referring court that clarification is required as to whether the Compensation Directive requires Member States to compensate victims for both material and non-material loss. Do the “*relevant criteria*” identified by the CJEU in *BV* represent the minimum standards required in order to ensure that a compensation scheme provides “*fair and appropriate*” compensation to victims of intentional crime within the meaning of Article 12(2)?

52. If so, then it also appears to the referring court that clarification is required as to what forms of loss fall within the scope of “*non-material loss*” and whether in particular this includes a victim’s “*pain and suffering*”. In short, are Member States required to provide some compensation for pain and suffering?

53. Finally, it is clear from *BV* that “*fair and appropriate compensation*’ for the purposes of the Compensation Directive does not necessarily correspond to the damages which might be awarded under the Personal Injury Guidelines as against the perpetrator of that crime.

However, it appears to the referring court that clarification is required as to the relationship between full compensation (being the damages which are likely to be awarded to the victim as against the perpetrator) on the one hand and the amount constituting “*fair and appropriate compensation*” for the purposes of the Compensation Directive, on the other.

REASONS FOR THE REFERENCE

54. The parties before the referring court all submit that in order to address the above issues arising in the Plenary Proceedings, the referring court requires the assistance of the CJEU to interpret Article 12(2) of the Compensation Directive.

55. The referring court agrees that, following the decision of the CJEU in *BV*, further clarity is required as to whether the Scheme, which prohibits the payment of compensation for pain and suffering in non-fatal cases, is incompatible with the State’s obligations under Article 12(2) of the Compensation Directive, and if so, on what criteria ought to guide the referring court in assessing damages for “*pain and suffering*”.

56. The referring court has been informed that there are approximately 17 separate cases pending before the Irish High Court in which this same issue has been raised. Those cases will benefit from the assistance that the CJEU might-give in the within proceedings.

57. In order to address the above issues arising in the Plenary Proceedings, the referring court requires the assistance of the CJEU in interpreting Article 12(2) of the Compensation Directive and in determining the specific questions below.

THE QUESTIONS REFERRED

- a) Does the obligation imposed on Member States by Article 12(2) of Directive 2004/80/EC (“**the Compensation Directive**”) to provide “*fair and appropriate compensation*” to victims of violent intentional crimes, require that a victim be compensated for both material and non-material loss within the meaning of *Presidenza del Consiglio dei Ministri v BV* (“*BV*”) (Case C129/19, EU:C:2020:566)?
- b) If the answer to Question (a) is yes, what forms of loss fall within the scope of “*non-material loss*”?

- c) In particular, does a victim's '*pain and suffering*' fall within the scope of "non-material loss?"
- d) If the answer to a) and c) is yes, bearing in mind that Member States are required to ensure that their schemes are financially viable, what relationship should the '*fair and appropriate compensation*' awarded to a victim pursuant to the Compensation Directive bear to the damages in tort that would be awarded to that victim as against the relevant perpetrator as tort-feasor.
- e) Can the compensation established for victims of violent intentional crimes under the '*Scheme of Compensation for Personal Injuries Criminally Inflicted*' (the "**Scheme**") be regarded as "*fair and appropriate compensation to victims*" within the meaning of Article 12(2) of the Compensation Directive if a victim is awarded the sum of €645.65 as compensation for a serious eye injury resulting in permanent sight impairment?

VIEW OF THE REFERRING COURT

58. The recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C380/01) states that the referring court may briefly state its view on the answer to be given to the questions referred for a preliminary ruling, as this information may be useful to the CJEU.

59. The view of the referring court on the issues raised at questions a) to c) above is as follows:

The three references by the CJEU (at §§. 60, 64 and 69 of *BV*) to "*fair and appropriate compensation*" encompassing "*non-material losses*" expressly and in addition to "*material losses*" strongly suggest that compensation for "*non-material losses*" cannot be entirely excluded.

Non-material damage or loss is conceptually indistinguishable from "*pain and suffering*" for which general damages are intended to represent fair and reasonable monetary compensation.

In addition, at §64 of *BV*, the CJEU stated that the compensation granted to victims represents a "*contribution to the reparation of material and non-material losses suffered by them*". The CJEU then stated that such a contribution may be regarded as "*fair and appropriate*" if it compensates, to an appropriate extent, the "*suffering*" to which those victims have been exposed. The reference to "*suffering*" also strongly implies that "*pain and suffering*" must be compensated at least to some extent.

Finally, it is hard to see how compensation can be said to take into account the “*seriousness of the consequences*” for the victim (as per §§ 63 and 69 of *BV*) if damages for “*pain and suffering*” are entirely excluded.

Therefore, in order to qualify as “*fair and appropriate compensation*” under Article 12(2), compensation for the victim must include some contribution in respect of “*pain and suffering*”.

22 March 2024