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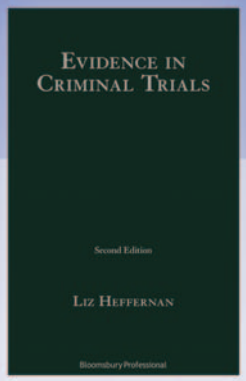

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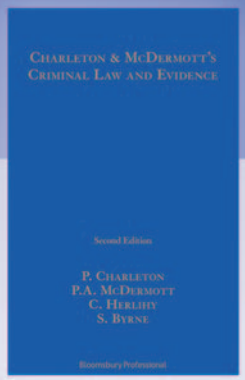

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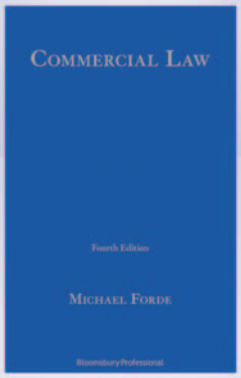

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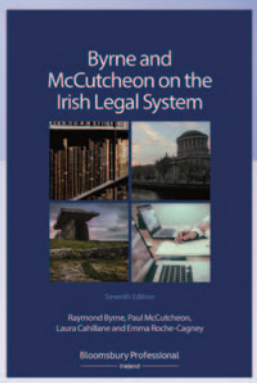

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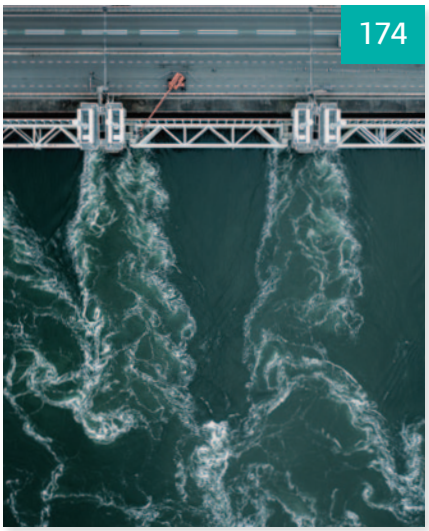

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Working within restrictions

The work of The Bar of Ireland in supporting members during the Covid-19 pandemic continues.

I noted for colleagues in my message published in the November edition of *The Bar Review* that I would, in my capacity as Chair, prioritise lobbying and representation of the interests of our profession throughout the course of my term and keep members informed. These last few weeks have presented ample opportunities to fulfil this priority!

Level 5 restrictions

The unexpected (or expected depending on your perspective) catapulting of our country into a level 5 lockdown for a six-week period had a significant impact on the courts. Members will be aware of my endeavours to raise their concerns arising from the reduction in the number of civil cases requiring witness testimony being listed or heard in Dublin during the restrictions. The President of the High Court has provided a detailed and robust response to those concerns, and that has assisted in providing an explanation to members regarding the approach to that decision making. While we may agree or disagree with the varying perspectives expressed, not unusual in our Bar of some 2,200 members, what is clear is that it is everyone's intention to work co-operatively with all stakeholders – the judiciary, the Courts Service, solicitors and litigants – in maximising the safe re-opening and continued sitting of our courts. We must be prepared for the possibility that our country could be faced with further periods of level 5 lockdowns. We each have a responsibility to find ways to work with our clients and the courts system to progress and maintain access to justice, and this may, by necessity, include changes in how we approach our own case management.

Government Restart Grant Plus

Adding further to the pressures being faced by our profession due to the Covid-19 challenges was the recent decision by Dublin City Council (DCC) to reject claims made by up to 500 members for the Restart Grant Plus scheme. The Council was shocked and dismayed by this surprising and disappointing development, and we were particularly concerned for those colleagues affected, who are predominantly members of our Junior Bar and young bar. Faced with this additional financial challenge, having been advised that they had successfully applied and been approved for the grant, and in many cases having received the funds, they were then told of a u-turn, and some faced with the invidious situation of a demand for repayment. The Council immediately responded to this issue. We were informed that DCC was considering our correspondence, which set out reasons why we believed its decision was both wrong and unlawful, and that DCC was consulting with its legal advisors and the Department of Enterprise, Trade and Employment. On December 9, DCC confirmed to the Council that "the appeals have been considered and the applications have been approved". This was very positive news for all concerned. I wish to express my sincere appreciation to all members and staff who worked intensively to secure this results.

Member survey

Members will recall that the Council undertook a member survey in May 2020, which revealed the stark reality of how Covid-19 has impacted on our profession and demonstrated that the sustainability of practice is now a major concern. It has been decided to undertake a further survey to get updated insights on how we are coping. I urge all members to respond to the survey, which should take less than three minutes to complete, the results of which will assist in our representations and are used by the Council to feed into its decision making on a range of matters.

Education and training

Members will be aware that the Legal Services Regulatory Authority (LSRA) published a further report in November 2020 regarding the provision of legal education and training for the profession. The report can be accessed at https://www.lsra.ie/wp-content/uploads/2020/11/Section-34-ET-Final-Report-to-Minister.pdf. Part 4 of the report sets out the conclusions and recommendations that the Authority considers appropriate to make in relation to the arrangements that should be in place for the provision of legal education and training, and also outlines the legislative and administrative reforms that are required to facilitate these arrangements. The Authority recommends the introduction of an independent Legal Practitioners Education and Training Committee (the LPET Committee), which will be responsible for setting and maintaining the standards in the provision of legal education and training across all providers. It further recommends that a detailed competency framework be developed against which the standards of education and training of legal practitioners can be benchmarked. The Education & Training Committee, under the leadership of Denise Brett SC, is actively reviewing the role of The Bar of Ireland in the provision of CPD for members to ensure that it can align with the future approach of the LSRA. The provision of CPD events by The Bar of Ireland and Specialist Bar Associations continues to go from strength to strength. A total of 24 events have taken place since the new legal year commenced. I would like to take this opportunity to record my appreciation to all those who are involved in making these highly valued events happen, particularly where I am aware of the extensive work behind the scenes that is required for each such event. I would also add that the pivot to online has been remarkable, and this success is entirely due to the hard work and dedication of our staff, who continue to go above and beyond the call of duty. In addition, the willingness of our many experts at the Bar to offer their time and share their insights with all Law Library members is very much appreciated.

Wishing you all a safe and peaceful Christmas break.

Maura McNally S.C.

Maura McNally SC
Chair,
Council of The Bar of Ireland

Optimism and clarity

As an extraordinary year ends, we look at recent case law, and new recommendations on the administration of civil justice.

With several vaccines in the pipeline, there is cautious cause for optimism as we wave goodbye to a year that has thrown up hitherto unimagined challenges. Dr Mike Ryan has been knee-deep in the thick of those challenges. In a personal interview, he reveals the daily reality of fronting health emergencies at the World Health Organisation during a once-in-a-century global pandemic.

The recent case of *UCC v ESB* has provided the factual backdrop for a re-calibration by the Supreme Court of the principles governing liability in negligence at common law.

Our author analyses the ramifications of this judgment and the circumstances in which public and private entities may now be found to have a duty of care to provide their neighbour with a benefit, as opposed to merely refraining from causing them harm. Liability in tort may now arise where a party exercises a special level of control over an independently arising danger.

The Court of Appeal has helpfully considered the impact of the Legal Services Regulation Act 2015 on costs awards and how a Calderbank letter can affect such an award.

Our writer examines the decision of *Higgins v Aviation Authority* and how costs might be awarded when neither party is "entirely successful" in relation to all issues in a case.

The working group established to conduct a comprehensive review of the administration of civil justice has now completed its final report. In our closing argument, we analyse the recommendations in that report and consider the proposed measures that are most likely to enhance access to justice for all.

Best wishes for a safe and happy Christmas.

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

PILA Pro Bono Pledge Ireland

On Thursday, November 26, the Minister for Justice Helen McEntee TD launched Pro Bono Pledge Ireland – an initiative of FLAC's Public Interest Law Alliance (PILA). This is the first collaborative effort in Ireland that articulates the shared responsibility of solicitors, barristers, law firms and in-house legal teams to commit to promoting access to justice by providing pro bono legal assistance to those in need. It includes a shared definition of pro bono legal work and a commitment to an aspirational target of 20 hours per lawyer per year. The Pledge is being supported by The Bar of Ireland, The Law Society of Ireland and the Dublin Solicitors Bar Association.

Chair of The Bar of Ireland, Maura McNally SC, said: "Law Library members have a long tradition of providing assistance and advice, both to individuals and organisations, on a pro bono basis.

The opportunity now to have this important work recognised by Pro Bono Pledge Ireland is a welcome step, and will greatly assist in the understanding of how the profession contributes to the wider well-being of the community. Our association with FLAC, PILA, and other similar free legal advice centres, and indeed our own Voluntary Assistance Scheme, all represent examples of the Bar working together to share its skills with those most in need".

The Bar of Ireland has endorsed the Pledge, and invites members to consider signing the pledge at www.probonopledge.ie.

To read the pledge click here.

IRLI in Tanzania

Community awareness session in Mpwapwa district discussing redress, support services and the importance of engagement between communities and criminal justice chain actors.

Irish Rule of Law International (IRLI), supported by The Bar of Ireland, has launched a new programme on investigating and prosecuting child sexual abuse (CSA) in Tanzania, alongside local partner the Children's Development Forum (CDF). IRLI has begun working with CDF to improve the practices and protocols of CSA investigations and prosecutions in Tanzania, where more than one in four girls, and more than one in seven boys, experience some form of sexual violence before they reach the age of 18. Despite this, there is an under-reporting of CSA and an inability to effectively investigate such matters. Ireland's own history of dealing with these matters has provided Irish criminal justice actors with significant expertise. IRLI hopes to harness these skills, and with the assistance of the Irish judiciary, legal professionals and An Garda Síochána, to assist in applying them to the Tanzanian context alongside CDF.

CDF already has a proven track record of advocating for the human rights of children at risk in Tanzania, including for children affected by child marriage and female genital mutilation. IRLI is working with CDF to develop CSA-specific training materials and deliver training courses to criminal justice institutions in Tanzania, as well as to social welfare officers and medical personnel. Already roundtables and training courses have taken place with criminal justice chain actors, social workers and medical professionals. CDF is also visiting villages in the Mpwapwa area giving presentations to communities along with police and social workers on children's rights and how cases are investigated.

IRLI will also facilitate both technical and information exchanges between members of criminal justice institutions from Ireland and Tanzania. Training courses will be held on investigative best practices for interviewing children and vulnerable persons. Prosecutors will be trained on evidentiary matters, including what constitutes sufficient evidence to prosecute a CSA matter. Judicial exchanges will centre on how to effectively handle CSA matters and evidence at trial, such as the possible use of video link evidence for CSA complainants to give their testimony. IRLI envisions that the project will have a long-lasting, sustainable impact, and that work on CSA cases will be used as a vehicle to improve the investigations of crimes committed against vulnerable persons and victims of sexual and gender-based violence more generally.

Roundtable on the availability of free medical services to gender-based violence survivors and completion of evidentiary police documents.

Human Rights Award

The Bar of Ireland recently presented its 2020 Human Rights Award to Dr Mike Ryan, Executive Director at the World Health Organisation.

The annual award is made in appreciation of outstanding contributions in the field of human rights and Dr Ryan was selected as a most worthy recipient in recognition of his tireless work in safeguarding and promoting public health. Dr Ryan has been at the forefront of managing acute risks to global health for nearly 25 years and, as the WHO Executive Director with responsibilities for its Health Emergencies Programme, he is leading the charge on the international containment and treatment of Covid-19.

The award was presented by Maura McNally SC, Chair of the Council of The Bar of Ireland, and Joseph O'Sullivan BL, Chair of the Human Rights Committee, in a virtual ceremony on November 26.

Maura McNally SC said: "The swift, expert guidance provided by the World Health Organisation since the arrival of the Covid-19 pandemic has provided great assurance and assistance to people and countries all over the world. That its response is headed up by an Irishman has been a particular source of pride and comfort for people in this country. To hear one of our own provide such authoritative advice in press briefings at the peak of the pandemic was particularly reassuring. For Dr Ryan, the pandemic we are currently living through is only the latest chapter of what has been an exceptional career working to combat emerging and epidemic disease threats. He has quite literally put his life on the line in the course of his work to defend people's human right to health – a right so highlighted in 2020 – and for that reason, he is a most deserving recipient of The Bar of Ireland's Human Rights Award".

From left: Joseph O'Sullivan BL, Chair of the Human Rights Committee; Dr Michael J. Ryan, Executive Director, World Health Organisation; and, Maura McNally SC, Chair of the Council of The Bar of Ireland.

Joseph O'Sullivan BL said: "The WHO Constitution was the first international instrument to enshrine the enjoyment of the highest attainable standard of health as a fundamental right of every human being, regardless of race, religion, political belief, economic or social condition. The Covid-19 pandemic has presented a challenge to global health that is unparalleled in living memory and we have some way to go yet to defeating it. We are truly indebted to Dr Michael J. Ryan and his colleagues at the WHO, who are working to combat Covid-19 on behalf of us all".

Specialist Bar news

The Specialist Bar Associations have been extremely busy in recent weeks, with a range of webinars and conferences.

Planning, Environment and Local Government Bar Association

The Planning, Environment and Local Government Bar Association (PELGBA) held two webinars in November, both chaired by James Connolly SC, Chair, PELGBA. On November 5, Tim O'Sullivan BL spoke on 'Update on recent case law in planning and environmental law', and on November 16, Mr Justice Richard Humphreys spoke on 'Practice and Procedure in the Commercial Planning and Strategic Infrastructure Developments (SIDS) List'.

Employment Bar Association

The Employment Bar Association (EBA) held its online conference on November 18 and 25, chaired by Alex White SC.
On November 18, the conference was opened by the President of the High Court, Ms Justice Mary Irvine, and speakers included: Eoin McCullough SC; Claire Bruton BL; and, Des Ryan BL.
On November 25, the session was opened by Roderic O'Gorman TD, Minister for Children, Equality, Disability, Integration and Youth, and speakers included: Sara Phelan SC; Mark Dunne SC; and, Claire Hogan BL.

European Bar Association

The European Bar Association (EUBA) meeting on December 3 was chaired by Judge Colm MacEochaidh, General Court of the European Union, and featured a keynote address from Niels Schuster, DG CLIMA, European Commission, on 'The European Green Deal and the Proposed European Climate Law'. Speakers included: Prof. Áine Ryall, University College Cork, and Vice-Chair, UNECE Aarhus Convention Compliance Committee; David Conlan Smyth SC; David Wolfe QC, Matrix Chambers, London; Suzanne Kingston SC; and, Conor Linehan, Partner, William Fry.

Probate Bar Association

The Probate Bar Association's webinar on November 17 was chaired by Vinog Faughnan SC. Robert Barron SC spoke on '*In re Horan Deceased*: the Last Rites for *Dunne v Heffernan*?'

Immigration, Asylum and Citizenship Bar Association

The Immigration, Asylum and Citizenship Bar Association (IACBA) held a conference on November 27, chaired by Mr Justice Brian Murray.
Speakers included: AG Hogan; Prof. Cathryn Costello, University of Oxford and Hertie School, Berlin; Prof. Steve Peers; Jonathan Tomkin, European Commission; Sara Moorhead SC; Michael Lynn SC; Prof. Suzanne Kingston SC; and, Aoife McMahon BL.

Professional, Regulatory and Disciplinary Bar Association

The Professional, Regulatory and Disciplinary Bar Association (PRDBA) held webinars in November and December, chaired by Elaine Finneran BL. On November 10, Maurice Osborne BL spoke on 'Recent Case Law - An Update', and on December 1, at the Association's AGM, Louise Beirne BL spoke on 'Prosecutorial Duties in Fitness to Practise Inquiries'.

Sports Law Bar Association

The Sports Law Bar Association (SLBA) held a conference on 'Innovation in Anti-doping' on December 4. The conference was moderated by Louise Reilly BL, Chair of the IBU Biathlon Integrity Unit, and speakers included: keynote speaker John Treacy, CEO, Sport Ireland; Prof. Richard H. McLaren, O.C., Independent Person at WADA Investigation of Sochi Allegations; Paul McGarry SC, Chair, SLBA; and, Susan Ahern BL, CAS Anti-Doping Panel Member.

Construction Bar Association

The Construction Bar Association's (CBA) Tech Talks on November 11 and 25 were chaired by James Burke BL.
The speaker on November 11 was Peggy O'Rourke SC on 'The arbitrator's jurisdiction and construction notices', while on November 25, David Aldridge, Doctor of Engineering, DGA Group, spoke on 'Delay and Disruption, the Devil is in the detail'.

New Catherine McGuinness Fellow announced

Noeleen Healy BL has been appointed the new Catherine McGuinness Fellow. Noeleen is a practising barrister working in the areas of immigration, asylum, family law and general civil law.

The Catherine McGuinness Fellowship is a prestigious one-year fellowship with the Children's Rights Alliance, supported by The Bar of Ireland and the Family Lawyers Association of Ireland. Sincerest thanks and well wishes to outgoing fellow Tríona Jacob BL.

Tríona supported some of the Alliance's core legal and policy work throughout the year, including the Report Card 2020, the Online Safety Campaign, the Know Your Rights Training Roadshow and the recently published Know Your Rights Guide to digital rights.

For more information on the Fellowship visit the Children's Rights Alliance website here.

New to the Bar

Congratulations and welcome to the 69 new barristers who were called to the Bar in October. As you enter the profession in these extraordinary times, we wish you every success in your career.

Sean Aherne

Martin Block

Stephen P. Brady

James Brennan

Michael Brennan

Ben Callanan

Hazel Cloughley Jones

Seamus Collins

Paul Connors

Una Crowley

Eugene Deering

Gillian Dempsey

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Edel Fitzpatrick

Mark Garry

Katie Glennon

Hugh Guidera

Rebecca Hanratty

Olivia Harrington

Amy Hughes

Ann Marie Kearney

Donna Kelly

Finn Keyes

Christopher Lehane

Kieran Lynch

Oscar Lyons

Fionn Maghnus MacCumhaill

Tomás Mac Thréinfhir

Roddy McConnell

Cian McGoldrick

Eoin McGovern

Gemma McLoughlin-Burke

Daniel McNamara

Bakshi Mohit

Gary Moloney

Robert Moloney

Andrew Moran

Niamh Murtagh Quinn

Kate O'Loughlin

Seán O'Mahony

Róisín O'Mara

Ade Oluborode

Caraig Phillips

Eamon Power

Conor Rock

James Rooney

Gavin Rothwell

Áine Rushe

Domhnall Ryan

Keivon Sotoodeh

Cian St John O'Leary

Grace Sullivan

Kyle Talbot

Rebecca Tierney

Hannah Tracey

Roberta Urbonaviciute

Emily Walker

Amy Walsh

Arlene Walsh-Wallace

Gordon Walsh

Ernest White

Janet Winston

Simon Wilson

Fighting the good fight

Recipient of The Bar of Ireland's 2020 Human Rights Award, Dr Mike Ryan, speaks about the challenges of tackling a global pandemic in a complex and diverse world.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Dr Mike Ryan has become one of the most recognised figures in the world, as the face of many World Health Organisation (WHO) press briefings on the Covid-19 pandemic. As Executive Director of the WHO's Health Emergencies Programme, Mike leads a team that deals with crises all over the world, from Ebola in Congo and yellow fever in Nigeria to humanitarian emergencies in Iraq, Syria and Yemen: "Anyone who says they don't feel pressure doesn't really understand the situation they're in. But we are an emergencies programme here. We're well trained and habituated to this type of situation".

Firefighting

Covid-19 is in one sense just another emergency for the team, but in another it is utterly different, as the first global pandemic in a century. Mike speaks matter of factly about putting their expertise to work in responding to Covid-19, but it's clear that this is not a simple process. From the very beginning, even finding out whether this would be the global event many have feared was immensely complex: "It is really hard at the beginning of any infectious disease event to say where it's going. We're constantly looking at the transmission dynamics of these organisms and then looking at their impact, because it's a mixture of transmission and severity. When you get an organism that transmits efficiently and kills a larger proportion of the people it infects, then you have a very serious pandemic potentially on your hands".

He uses the evocative analogy of an Irish bog fire to describe the process: "You see these bog fires and you see smoke coming out of part of the bog. But in fact, the fire is burning underneath and it pops up somewhere else. It doesn't look like a major emergency. And you see the emergency services desperately fighting this bog fire and you're thinking there's only a little fire over there. But what they know is there's something burning underground. The problem in an epidemic is the first thing you see is that little puff of smoke. The question is how much of the bog is burning underneath?"

This was the case with Covid-19, as what was at first just a concern on the part of an observant clinician about a cluster of unusual cases of pneumonia quickly became the situation that we find ourselves in today: "There was no moment where you went, oh, this is it. But certainly, by late January, it was absolutely clear that this virus had a severity marker, it had a transmission marker, it was a coronavirus, and its dynamics were highly suggestive of a disease that would move between and within countries with a high degree of efficiency. And that's unfortunately proven to be the case".

Sliding doors

Originally from the west of Ireland ("between Mayo and Galway, but I played my football in Sligo so I'm claimed there too!"), Mike Ryan planned to be a marine biologist before switching his attention to medicine.

He talks of his early career as a series of "sliding doors" – originally training in orthopaedics and trauma, he went to Iraq on his way to Australia, where he was caught up in the war with Kuwait.

A serious car accident there put an end to his surgical career and precipitated the move to public health medicine and infectious diseases. At the back of it all was a wish, stemming from working in Africa as a medical student, to be of use in the developing world: "I realised very quickly in the African environment that your true value as a doctor was to be the surgeon, because the nurses and the clinical officers did most of the treatment.

"When that opportunity escaped me, I thought the next best thing you could be is a public health doctor.

"People say to me, you must have had a big plan Mike. I had no plan. I just crashed about, like being in the dodgems, you know, I bounced from one thing to the next. And such is life".

Global response

Even before the declaration of a global public health emergency in January, the WHO had begun to issue guidance on infection control, transmission interruption, clinical management and epidemiologic investigation. Subsequently, the Strategic Preparedness and Response Plan was issued, which had already been under development, and which could be adapted to each country's requirements. Countries have of course adapted those plans in different ways, and we've all heard the endless discussions and comparisons between approaches taken in different parts of the world, their successes and failures. For Mike, it's not as simple as saying there's a right or a wrong way to handle the situation; each country's culture, history and health infrastructure create a unique situation that will inform their response: "The big debate at the beginning of this pandemic and all the way through is containment or mitigation. Should we try and suppress the virus or should we just let it rip and try and protect those most likely to die? The binary nature of that argument to me is quite idiotic because the answer is you should do both, if your circumstances allow".

> *"You see the emergency services desperately fighting this bog fire and you're thinking there's only a little fire over there. But what they know is there's something burning underground. The problem in an epidemic is the first thing you see is that little puff of smoke. The question is how much of the bog is burning underneath?"*

He talks about Asian and African countries, where a combination of prior experience with deadly pandemics and a culture of implementing and following health guidelines that filters down from government to population, has been relatively successful, or New Zealand, Australia and other countries, where resources were put into containment from the start: "A lot of the success of this response has not been down to the individual strategies. Those countries have all done different things – Korea, Australia, Vietnam, Cambodia – they've all had a slightly different package adapted to their socioeconomic and cultural context, the strength of their health systems, the capacity to test. But what they've all done is applied, consistently and persistently, a flexible strategy across all of the different things they could do".

Crucial to all of this, he says, is a sense of "collective spirit", a sense of something achieved as a community, and for that to happen, there has to be leadership: "Governments who haven't recognised the suffering of their own people are not in a position to tell people what to do. Governments who don't internalise the damage, the death, the destruction, and take it upon themselves seriously to deal with that, and those who have denied the virus, have probably now got the worst situations in the world".

Closer to home

So how does he think Ireland has done? Mike's answer is, of course, not as simple as saying we've done well or badly; as an Irish doctor, he understands the context in which Ireland has had to deal with this crisis: "I think the Irish population did an amazing job in March, April, May, with very high levels of compliance with measures, both personal and Government. And again, this time around. Ireland was the first country in Europe to turn the curve around this time by a number of weeks. So clearly, Ireland took early action in the second wave; they've done the right things. I think Tony Holohan and Ronan Glynn have done a really good job as CMO and deputy CMO, and NPHET too".

He also speaks of the challenges of trying to contain the virus while also protecting the economy, and this feeds into a wider discussion of what we prioritise as a society, which Covid-19 has thrown into sharp relief: "I think part of the reason Ireland and other countries have suffered is because we've had decades of underinvestment in our public health infrastructure. And that's not something you can just build overnight. The issue is the policies we have, and this is the same for many countries in Europe and beyond. This is no longer a health issue. This is an issue about the security of the state, the nation, the economy, our social systems. And when you look at the price we're all paying for this, are we really going to go forward from this, even when we win, and not invest in the invisible invaders? It's highly unlikely that swarms of armies are going to cross Irish borders and take over the country. But a very small microbe has sailed into the country and taken over. And the question is, what defences did we really have in place for that?"

It's not just about public health, but health in general, and our attitudes to it: "Too many countries see health as a cost. It's seen as a drain on the economy.

We spend billions every year on the Irish economy and creating the conditions for foreign direct investment. We need to change our paradigm of health from a cost paradigm to an investment paradigm, a protection paradigm. What I'm saying is not a criticism of the current administrations. It's all administrations. It's all of us. It comes back to the citizen in the end – you get what you vote for. We need to put health and healthcare, health protection, back at the centre of our concern as a society. And we need to demand better protection".

Rights and responsibilities

This idea of the citizen's role in deciding what kind of health system, what kind of society, they want, is central to the response to Covid-19. If it was as simple as the WHO making recommendations, governments implementing those recommendations, and citizens happily complying, then all would be well, one might think. But, of course, there's more to it than that, and the law has a vital, and complex, role to play. Mike is all too aware of the delicate balancing act between individual freedoms and public good that the pandemic has highlighted: "What is the extent of governmental power? Is this a response to be legislated for with enforcement, or a response in which you build on the community's knowledge and desire to do something collectively and then use enforcement only in situations where that cannot be achieved?"

It's the age-old old argument of rights versus responsibilities: "It comes into stark focus when you look at infectious diseases. I have a right to go out. I have a right not to wear a mask. I have a right to hold parties in my house. And on the face of it, that's true".

For Mike, it's about putting the people back at the centre of the process, about citizens taking ownership of and responsibility for the laws that govern them: "How do we make sure that our legislative bodies and our legislation is supporting both the right of the individual and the right of communities to feel protected and feel safe? How do we use the rule of law? The rule of law is seen increasingly as something that has been, shall we say, hijacked by populism, and I think people, citizens, need to take back ownership of the law in a sense, of the legal system. The law is there to protect me and protect others. If it doesn't, we should hold it to account. But the law by itself doesn't represent an external force. The law is the laws we agree, and the laws we agree are voted on by the people we elect. And I think people have lost connection with that".

The consequences of not taking that ownership, particularly in a crisis like this one, can be dire: "We have seen how epidemics are an opportunity for human rights violations. They can be an excuse to isolate and blame marginalised groups. We saw it with HIV, with TB, with polio. We're now seeing it with coronavirus. It is really easy for propagandists to manipulate the fear of contagion because the fear of contagion is very deep seated. Governments need to be very careful in how they utilise existing laws and particularly careful how they institute new laws to ensure that those laws are aimed at doing what they think they will do and that they're implemented in a very careful and balanced manner".

Needless to say, he feels that public health law has a crucial role to play in this: "Who is empowered to implement the law? Is it the police? Is it public health authorities? Is it environmental health officers? A lot of issues have arisen around the world, not around the existence of the law, but around who is empowered to enforce it and are the resources there to enforce it? I think every country probably needs to take its public health law out of the box, give it a very good shake and see is it fit for purpose for what we face in a globalised world. Can we define and design well-adapted legal structures and processes that help contain epidemics without destroying some of the fundamental rights that people have fought so hard for in their lives? It's a very important discussion and a fascinating one".

The infodemic

In order for people to be empowered to make all of these hugely important decisions, they need the right information. In this age of populism and social media, the WHO finds itself in a battle on two fronts: against the pandemic, and against what Mike and his team call the "infodemic" of misinformation and conspiracy theories. With the news that several vaccines are on the horizon, and indeed beginning to be rolled out in some countries, this is more important than ever. It's not a new battle for the WHO, however, and enormous work has already been done on "infodemiology": "For the first time, we've set up a major international virtual training course for infodemiologists, and we're training people with backgrounds both in communications and in science so we can advise governments better on how to manage their infodemics".

Part of the challenge is to tailor the message across diverse groups and cultures. The WHO is working with youth organisations all over the world in its virtual Design Lab, where young people can design education materials for themselves, and Mike is also aware of the importance of not just speaking to a bubble of likeminded people: "It's one thing to address the concerns of liberals, but there are people of conservative values who look at the world a different way. Have we really made the effort to articulate our message in a way that can be understood and internalised by everybody? Are we willing to have a true dialogue with people where we listen and where we don't have to accept everything the other person says, but get back to having real conversations and not polemics?"

Mike has never been afraid of complexity, and he believes that people are capable of absorbing that complexity, and doing the right things, but that takes honesty about what's going on from people like him: "I think we have to be willing to express uncertainty. We have to be willing to express and communicate change. We have to be able to say when we don't know what we don't know. We're always taught as leaders to project strength and absolute certainty. But you also have to be humble and empathise with people".

Ultimately, it's about trusting the information, and the audience: "The best antidote for disinformation is good information. Instead of fighting the platforms or fighting the messengers, we need to fight the message. And we need to get much better. I honestly believe the vast majority of people, if they're presented with good information and disinformation, will take the good information. But when you're behind and the disinformation gets there first, you're finished – it doesn't work. We have to be much faster, much more agile".

"Benjamin Franklin said: 'Tell me and I forget, teach me and I may remember, involve me and I learn'. I always carry that around with me, that we miss the involve part in this and therefore it never becomes internalised, it doesn't change social mores. It's not just for infectious diseases. That could be for climate change, for social justice, for the way we treat marginalised people in our societies. We have to find a different way to talk about these really important issues and avoid them just becoming these binary, polemic discussions. There are no easy answers".

LEGAL UPDATE

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The Law Library

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ADOPTION

Adoption order – Welfare of child – Adoption Act 2010 s. 18(6) – Applicant seeking an order approving the making of an adoption order – Whether the various factors to which the court was required to have regard when assessing the best interests of the child had been comprehensively addressed – [2020] IEHC 511 – 13/10/2020
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Adoption Authority of Ireland v X (minor)
Adoption order – Welfare of child – Adoption Act 2010 s. 30(5) – Applicant seeking an order approving the making of an adoption order – Whether the various factors to which the court was required to have regard when assessing the best interests of the child had been comprehensively addressed – [2020] IEHC 494 – 05/10/2020
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AGRICULTURE

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Civil law and criminal law (designated body – agriculture) order 2020 – SI 411/2020
Forestry (Miscellaneous Provisions) Act 2020 (commencement) order 2020 – SI 412/2020
Agriculture Appeals Act 2001 (amendment of schedule) regulations 2020 – SI 415/2020
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National Milk Agency (members) regulations 2020 – SI 509/2020

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Statutory instruments

Greyhound Racing Act 2019 (commencement) order 2020 – SI 399/2020

BANKING

Negligence – Breach of duty – Breach of contract – Plaintiffs appealing from the order dismissing their case against the second and third defendants and awarding the second and third defendants their costs – Whether the trial judge erred in directing a preliminary hearing on the Statute of Limitations 1957– [2020] IECA 27 – 13/10/2020
Elliott v ACC Bank Plc

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Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 31) (Central Bank of Ireland) (designation) order 2020 – SI 422/2020

BUILDING LAW

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Building control (prescribed qualifications) regulations 2020 – SI 468/2020

CHILDREN

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DPP v C
Wrongful removal – Habitual residence – Return – Applicant seeking return of child – Whether child had been wrongfully removed – [2020] IEHC 504 – 25/08/2020
M.I. v M.B.R

Acts

Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records, and Another Matter, Act 2020 – Act No. 20 of 2020 – Signed on October 25, 2020

Statutory instruments

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COMPANY LAW

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Luby v Lennon
Appointment of an examiner – Jurisdiction – Companies Act 2014 s. 509 – Company seeking the protection of the High Court under Part 10 of the Companies Act 2014 – Whether the appointment of an examiner was necessary – [2020] IEHC 514 – 14/10/2020
New Look Retailers (Ireland) Ltd v The Companies Act, 2014
Security for costs – Companies Act 2014 s. 52 – Rules of the Superior Courts O. 86, r. 9 – Respondent seeking an order requiring the appellant to provide security for costs of its appeal – Whether the respondent had demonstrated a risk of added and unnecessary injustice in the bringing of the appeal – [2020] IECA 226 – 06/08/2020
O'Donnell v Saltan Properties Ltd
Financial statements – Jurisdiction – Companies Act 2014 s. 366 – Appellant seeking an order revising and/or correcting and/or rectifying a statutory financial statement filed with the respondent – Whether the High Court had jurisdiction to direct the respondent to replace a set of full financial statements that were filed in error with a set of abridged financial statements instead – [2020] IECA 266 – 02/10/2020
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CONSUMER LAW

Statutory instruments

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 31) (Competition and Consumer Protection Commission) (designation) order 2020 – SI 455/2020

CONTRACT LAW

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Data Protection Commissioner v Facebook Ireland Ltd and anor

Costs – Stay – Extraordinary circumstances – Respondents seeking costs – Whether there should be no costs award in favour of the respondents having regard to the unique and extraordinary circumstances – [2020] IECA 274 – 06/10/2020

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Rules of the Superior Courts (judges' robes) 2020 – SI 495/2020

District Court (order 36) rules 2020 – SI 496/2020

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Sentencing – Indecent assault – Totality – Appellant seeking to appeal against sentence – Whether sentence was disproportionate in light of the totality principle – [2020] IECA 270 – 14/09/2020

DPP v A.M.

Crime and sentencing – Sexual offences – Indecent assault – Appellant seeking to appeal against conviction – [2020] IECA 139 – 22/05/2020

DPP v C.C.

Case stated – Conviction – Driving while under the influence of an intoxicant – Circuit Court judge stating a question for the Court of Appeal on a consultative case stated –In order for a member of the Garda Síochána lawfully to require an arrested person to permit a registered doctor or a registered nurse to take a specimen of the person's blood under s. 13B(1) of the Road Traffic Act 2010 is it sufficient for the member to have carried out any one of the tests specified in paragraphs (a), (b) and (c) of the said section? – [2020] IECA 263 – 30/09/2020

DPP v Clyne

Sentencing – Assault causing harm – Undue leniency – Appellant seeking review of sentence – Whether sentence was unduly lenient – [2020] IECA 255 – 28/09/2020

DPP v Connor

Sentencing – Dangerous driving causing serious bodily harm – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – [2020] IECA 294 – 30/10/2020

DPP v Flynn

Sentencing – Sexual assault – Mitigation – Appellant seeking to appeal against sentence – Whether insufficient discount was afforded for mitigating factors – [2020] IECA 272 – 21/09/2020

DPP v M.W

Sentencing – Rape – Undue leniency – Respondent seeking review of sentence – Whether sentence was unduly lenient – [2020] IECA 269 – 31/07/2020

DPP v Nevin

Sentencing – Theft – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2020] IECA 271 – 15/09/2020

DPP v O'Brien (1)

Sentencing – Drug offence – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2020] IECA 267 – 17/09/2020

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DAMAGES

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Leidig v O'Neill

Cause of action – Pleadings – Delay – Appellant seeking damages – Whether the appellant's claim disclosed a reasonable cause of action – [2020] IESC 67 – 04/11/2020

Mangan v Dockery

Road traffic accident – Liability – Injuries – Plaintiff seeking damages – Whether the plaintiff was aware that the first defendant was uninsured – [2020] IEHC 555 – 30/10/2020

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Guerin v O'Doherty

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Motion for discovery – Stay of execution – Summary proceedings – Appellants appealing against an order of the High Court granting the respondent discovery in aid of execution – Whether a stay of execution operated to disentitle the respondent from issuing a motion for discovery in aid of execution – [2020] IECA 261 – 30/09/2020
Allied Irish Bank Plc v King
Discovery – Security for costs – Breach of duty – Parties seeking discovery of documents – Whether the plaintiff ought to provide security for the costs of discovery – [2020] IEHC 543 – 29/10/2020
Betty Martin Financial Services Ltd v EBS DAC

EDUCATION

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Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 29) (Labour Court) (designation) order 2020 – SI 514/2020
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European Union (restrictive measures concerning the Democratic People's Republic of Korea) regulations 2020 – SI 391/2020
European Union (restrictive measures concerning the Democratic Republic of the Congo) (no. 2) regulations 2020 – SI 392/2020
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European Union (regulation of railways) (amendment) regulations 2020 – SI 398/2020
European Union (railway safety) (reporting and investigation of serious accidents, accidents and incidents) regulations 2020 – SI 430/2020
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European Union (cross-border parcel delivery services) regulations 2020 – SI 433/2020
European Union (workers on board seagoing fishing vessels) (organisation of working time) (no. 2) regulations 2020 – SI 441/2020
European Communities (merchant shipping) (investigation of accidents) (amendment) regulations 2020 – SI 444/2020
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European Union (railway safety) regulations 2020 – SI 476/2020
European Union (restrictive measures concerning Ukraine) (no. 3) regulations 2020 – SI 490/2020
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Minister for Justice and Equality v Laipnieks
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Minister for Justice and Equality v Purse
European arrest warrant – Surrender – Waiver of rights – Appellant seeking the surrender of the respondent to Romania pursuant to a European arrest warrant – Whether non-attendance at a hearing was sufficiently informed to amount to an unequivocal waiver of rights – [2020] IESC 59 – 28/09/2020
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European arrest warrant – Surrender – Right to a family and private life – Applicant seeking an order for the surrender of the respondent to the Republic of Poland pursuant to a European arrest warrant – Whether surrender would amount to a disproportionate interference with the respondent's right to a family and private life under article 8 of the European Convention on Human Rights – [2020] IEHC 532 – 20/10/2020
Minister for Justice and Equality v Zegarek

FAMILY LAW

Judicial separation – Access – Guardianship of Infants Act 1964 – Appellant seeking access – Whether the social, intellectual and educational upbringing and needs of the child lay in the court making an order along the lines recommended by the expert psychotherapist – [2020] IEHC 480 – 24/09/2020
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Credit institutions resolution fund levy (amendment) regulations 2020 – SI 406/2020
Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 31) (Financial Services and Pensions Ombudsman) (designation) order 2020 – SI 420/2020
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Foreign Affairs and Trade (alteration of name of department and title of minister) order 2020 – SI 382/2020

Appointment of special advisers (Minister for Public Expenditure and Reform) order 2020– SI 397/2020

Culture, Heritage and the Gaeltacht (alteration of name of department and title of minister) order 2020 – SI 403/2020

Appointment of special adviser (Minister for Rural and Community Development) order 2020– SI 419/2020

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 29) (local authorities) (designation) order 2020 – SI 445/2020

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 29) (regional assemblies) (designation) order 2020 – SI 446/2020

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Appointment of special adviser (Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media) order 2020 – SI 460/2020

Appointment of special adviser (Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media) (no. 2) order 2020 – SI 461/2020

Justice (delegation of ministerial functions) order 2020 – SI 504/2020

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Acts

Regulated Professions (Health and Social Care) (Amendment) Act 2020 – Act No. 16 of 2020 – Signed on October 14, 2020

Health (Amendment) Act 2020 – Act No. 19 of 2020 – Signed on October 25, 2020

Statutory instruments

Health Insurance Act 1994 (section 11E(2)) regulations 2020 – SI 378/2020

Appointment of special advisers (Minister for Health) order 2020 – SI 383/2020

Health (delegation of ministerial functions) order 2020 – SI 394/2020

Health (delegation of ministerial functions) (no.2) order 2020 – SI 395/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (face coverings in certain premises and businesses) (amendment) regulations 2020 – SI 404/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (face coverings on public transport) (amendment) regulations 2020 – SI 405/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 6) regulations 2020 – SI 413/2020

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Health (General Practitioner Service and Alteration of Criteria for Eligibility) Act 2020 (section 2) (commencement) order 2020 – SI 462/2020

Health services (amendment) regulations 2020 – SI 463/2020

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Health services (prescription charges) (over 70s) regulations 2020 – SI 465/2020

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Nurses and midwives (recognition of professional qualifications) (amendment) rules 2020 – SI 501/2020

Nurses and midwives (recognition of professional qualifications) (amendment) rules 2020 – SI 502/2020

Nurses and midwives (register of nurses and midwives) (amendment) rules 2020 – SI 503/2020

Misuse of drugs (prescription and control of supply of cannabis for medical use) (amendment) regulations 2020 – SI 505/2020

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Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (amendment) (no. 7) regulations 2020 – SI 513/2020

HOUSING

Statutory instruments

Housing, planning and local government (alteration of name of department and title of minister) order 2020 – SI 408/2020

Appointment of special adviser (Minister for Housing, Local Government and Heritage) order 2020 – SI 478/2020

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Health (amendment) bill 2020 – Bill 42/2020

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Latent defects redress bill 2020 – Bill 45/2020 [pmb] – Deputy Eoin Ó Broin

Mental health parity of esteem bill 2020 – Bill 40/2020 [pmb] – Deputy Mark Ward

Railway safety (reporting and investigation of serious accidents, accidents and incidents involving certain railways) bill 2020 – Bill 41/2020

Regulation of lobbying (post-term employment as lobbyist) bill 2020 – Bill 49/2020 [pmb] – Deputy Ged Nash

Residential tenancies bill 2020 – Bill 44/2020

Residential tenancies (extension of eviction ban) bill 2020 – Bill 46/2020 [pmb] – Deputy Paul Murphy, Deputy Bríd Smith, Deputy Gino Kenny, Deputy Richard Boyd Barrett and Deputy Mick Barry

River Shannon management agency bill 2020 – Bill 39/2020 [pmb] – Deputy Sorca Clarke, Deputy Violet-Anne Wynne, Deputy Martin Kenny and Deputy Claire Kerrane

Thirty-ninth amendment of the Constitution (right to a home) bill 2020 – Bill 37/2020 [pmb] – Eoin Ó Broin

Safety, health and welfare at work (amendment) bill 2020 – Bill 36/2020 [pmb] – Deputy Louise O'Reilly

Bills initiated in Seanad Éireann during the period October 6, 2020, to November 13, 2020

Children (amendment) bill 2020 – Bill 51/2020 [pmb] – Senator Michael McDowell, Senator Rónán Mullen, Senator David P.B. Norris, Senator Victor Boyhan and Senator Gerard P. Craughwell

Commission of investigation (mother and baby homes and certain related matters) records, and another matter, bill 2020 – Bill 38/2020

Criminal justice (hate crime) bill 2020 – Bill 52/2020 [pmb] – Senator Fiona O'Loughlin, Senator Robbie Gallagher and Senator Lisa Chambers

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Health (amendment) bill 2020 – Bill 42/2020 – Committee Stage – Passed by Dáil Éireann

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For up-to-date information please check the following websites:

Bills & Legislation

http://www.oireachtas.ie/parliament/

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For up-to-date information please check the courts website: https://www.courts.ie/determinations

Costs and the "entirely successful" test: *Higgins v Irish Aviation Authority*

A recent case afforded the first opportunity for the courts to interpret an important aspect of the Legal Services Regulation Act 2015.

David Byrnes BL

The Court of Appeal was given its first opportunity to interpret the meaning of "entirely successful" (as appearing under s.169(1) of the Legal Services Regulation Act 2015) for the purpose of an award of costs in circumstances where neither party entirely succeeded in the appeal. In *Higgins v Irish Aviation Authority* [2020] IECA 277, both parties relied on ss.168 and 169 of the 2015 Act and the consequential recast version of O.99 Rules of the Superior Courts (RSC). The Court also considered the timing of delivery of a Calderbank letter, the significance of which featured heavily in the costs of the appeal.

The appeal was brought only against the assessment of the quantum of damages awarded by a jury for defamation, which the Court reduced from €387,000 to €76,500 – a reduction of both general and aggravated damages. Nonetheless, both parties contended that they had "won the event" and that the costs of the appeal should in consequence be ordered in their favour. However, neither party was successful on all of the four issues in the appeal. The respondent failed on both fronts to hold the full award and in the alternative to have the matter remitted for determination by a jury. The Court noted that the appellant had the "greater success" of a substantial reduction in the award, but at the same time failed to have damages assessed at the level for which it contended, failed to increase the deduction made in respect of the offer of amends, and also failed to overturn the imposition of aggravated damages.

The appeal was brought only against the assessment of the quantum of damages awarded by a jury for defamation, which the Court reduced from €387,000 to €76,500 – a reduction of both general and aggravated damages.

Significant questions

In this case, the Court considered the application of ss.168 and 169 of the 2015 Act when viewed in the light of the consequential recast version of O.99, r.3(1) RSC. This involved the Court addressing the following four questions:

1. Has either party to the proceedings been "entirely successful" in the case, as that phrase is used in s.169(1)?
2. If so, is there any reason why, having regard to the matters specified in s.169(1)(a)-(g), all of the costs should not be ordered in favour of that party?
3. If neither party has been "entirely successful", have one or more parties been "partially successful" within the meaning of s.168(2)?
4. If one or more parties have been "partially successful", and having regard to the factors outlined in s.169(1)(a)-(g), should some of the costs be ordered in favour of the party or parties that were "partially successful" and, if so, what should those costs be?

The Court noted that the appellant had the "greater success" of a substantial reduction in the award, but at the same time failed to have damages assessed at the level for which it contended, failed to increase the deduction made in respect of the offer of amends, and also failed to overturn the imposition of aggravated damages.

In answering those questions, Murray J. stated that it is "particularly important" that whether a party is "entirely successful" is "primarily relevant to where the burden lies" within the process of deciding how costs should be allocated and, if a party is "entirely successful", all of the costs follow – subject to the Court's discretion to direct otherwise having regard to the factors enumerated in s.169(1). If "partially successful", the costs of that part on which the party has succeeded may be awarded in its favour, bearing in mind those same factors or, that party may perhaps succeed in obtaining all of its costs in an appropriate case.

The Court agreed with the "pragmatic conclusion" enunciated by Simons J. in *Naisiénta Leichtreach Contraitheoir Eireann Cuideachta Faoi Theorainn Rathaiochta v The Labour Court* [2020] IEHC 342 that when "determining whether a party has been successful for the purposes of s.169(1), the correct approach is to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues".

The Court also considered three possible directions suggested by Simons J. for the inquiry as to whether a party has been "successful" in proceedings:

1. By examining the relief claimed and determining whether the party has obtained (or successfully resisted the application for) the orders sought in the action. In this respect, Murray J. noted that prior to the 2015 Act, the starting point was that a party who has had to come to court to obtain relief should have their costs of securing it (per *Godsil v Ireland* [2015] 4 IR 535 and *Veolia Water UK plc v. Fingal CC* (No. 2) [2007] 2 IR 81).
2. By breaking down the issues in the action and assessing which party has prevailed on which issue.
3. By interrogating the case further and examining the arguments advanced on each issue assessing which party won which argument. However, the Court rejected outright this latter suggestion on the basis that the process of determining where costs should lie would otherwise become "hopelessly cumbersome" and the Court confirmed that the allocation of costs has never been determined on the basis of "adding up points".

Accordingly, Murray J. held that the award of the parties' costs was to be allocated according to the elements of the proceedings on which they were partially successful as required by s.168(2)(d) of the 2015 Act, and that O.99 r.3(1) RSC requires the Court to conduct that exercise having regard to the matters in s.169(1) of the 2015 Act. This, it was observed by the Court, reflected the type of considerations that have traditionally been taken account of by the Court in exercising its discretion on costs.

In this regard, the Court agreed that the making of a costs order in such cases essentially involves a balancing exercise for determining which order will cause the least "unfairness" and "hardship" to a respondent (whose award of damages was reduced) and an appellant (who had a well-founded appeal) where the difference in the reduction of the award is "eaten away" by legal costs.

Specific difficulties

Referring to the specific difficulties when deciding on a just costs order in cases where an award of damages is reduced by an appellate court, Murray J. referred to the explanation given by Geoghegan J. in *MN v. SM* [2005] 4 IR 461. In this regard, the Court agreed that the making of a costs order in such cases essentially involves a balancing exercise for determining which order will cause the least "unfairness" and "hardship" to a respondent (whose award of damages was reduced) and an appellant (who had a well-founded appeal) where the difference in the reduction of the award is "eaten away" by legal costs. In the context of working out this balancing exercise, the Court highlighted that a Calderbank offer can assume decisive importance when making a just costs order as it affords a mechanism for at least abating the element of unfairness that might otherwise arise – particularly in cases of appeals against the assessment of the quantum of damages. The Court observed that the facility for the making of offers to settle proceedings (without prejudice save as to costs) has been put on a statutory footing by virtue of s.169(1)(f) of the 2015 Act and the recast version of O.99 r.(3)(2) RSC. As illustrated below, the timing and content of any such offer will be scrutinised by the Court.

The appellant delivered a Calderbank offer dated April 14 and the appeal was listed for hearing on April 28. The offer proposed was that the respondent retain €100,001 of the award of damages, his costs in the High Court, and for both parties to bear their own costs of the appeal. This offer was held by the Court to be "less than effective" since it was made at a late stage in the appeal and did not include an offer to pay costs of the appeal incurred up to that point. Murray J. was of the view that on any reasonable estimate, the appeal costs incurred by the respondent meant that the benefit to him of the offer was less than the sum awarded on appeal.

It was in this context that the Court issued a clear warning to litigants: "If this procedure was adopted more often, the injustices which can arise in relation to costs of an appeal would be greatly reduced", quoting the dicta of Geoghegan J. in MN from way back in 2005.

The Court emphasised that in an appeal against the quantum of an award, it is open to an appellant to put their opponent on risk of costs by making an offer that reflects the damages likely to be awarded on appeal. If this is done at the same time the appeal is lodged, the appellant avoids having to pay their opponent's costs but, if done at a later stage after additional costs have been incurred, the offer should also include the payment of the respondent's costs up to that point for the offer to be effective. Similarly, the respondent failed to secure the costs of the appeal by not making any offer or any counter-offer.

Had he done so, and had it not been accepted, if he had subsequently retained what he might have offered to take or obtained more than that on appeal, his case for costs would have been "very strong". It was in this context that the Court issued a clear warning to litigants: "If this procedure was adopted more often, the injustices which can arise in relation to costs of an appeal would be greatly reduced", quoting the dicta of Geoghegan J. in MN from way back in 2005.

The respondent argued that the Calderbank offer imposed a new constraint on the appellant so that the 'event', for the purposes of the costs of the appeal, must be determined by reference to that offer, and that the respondent succeeded if he obtained an award, inclusive of costs, greater than the sum offered. However, the Court rejected any contention that the Calderbank offer established a "new cap", which should entitle the respondent to his costs if he exceeded it.

The Court stated that this would have the effect of discouraging the making of such offers, as it would mean that a defendant "who did not attempt to obtain a resolution of the matter prior to the hearing of the appeal might be in a better position in resisting an application for the costs of the appeal than the defendant who made such attempt". The alternative argument advanced on behalf of the respondent was that the Court should take a "graduated approach" to the costs, but this was also rejected as the Court did not believe that the circumstances relied upon by the respondent in support of its "graduated approach" altered the outcome.

In the particular circumstances of this case, the Court concluded that the fairest way to distribute the cost of the appeal was to make no order for costs. Murray J. did not believe the time or cost could be reliably split by reference to the issues on which the parties prevailed. The respondent did however retain his award of costs in the High Court.

Welcome decision

This is the first time the Court of Appeal has had the opportunity to interpret the meaning of the new term, "entirely successful", as appearing under s.169(1) of the 2015 Act. The legislative basis for the awarding of costs has changed and now appears across the provisions of ss.168 and 169 of the 2015 Act and the recast Order 99 RSC (S.I. 584/2019 – Rules of the Superior Courts (Costs) Order 2019).

The former came into force on October 7, 2019, and the latter took effect from December 3, 2019. This is an important and welcome decision for a number of different reasons.

The Court confirmed that the considerations contained in s.169(1) of the 2015 Act reflect the type of considerations that have traditionally been taken account of in the case law by a court in exercising its discretion on costs. The Court also reemphasised that a Calderbank offer (now having the force of statute under s.169(1)(f) of the 2015 Act) can be a decisive factor in determining the issue of costs.

The Court will be prepared to scrutinise the content as well as the timing of issuance of such offers. In the context of an appeal, the Court confirmed that this responsibility falls on both appellant and respondent to secure their position as to costs by the making of an offer or counter-offer as the case may be – the same principle surely applies with equal force when deciding on the issue of costs in courts of first instance. Such offers are a persuasive, effective and decisive means of assisting the court when carrying out the 'balancing exercise' for determining costs in cases where neither party is entirely successful, in order to abate the unfairness and hardship caused to litigants.

It is important to note that Part 11 of the 2015 Act applies to "civil proceedings", effectively meaning costs in all civil proceedings. The scope of the recast version of Order 99 has expanded, with the consequence that a court is no longer precluded from having regard to such offers in writing that are made to settle personal injury proceedings (disallowed previously by Order 99 (1A)(1)(b) as inserted by SI 12/2008 and now replaced by SI 584/2019). It seems inevitable that Calderbank-type offers will feature more prominently in all forms of civil litigation, particularly personal injury actions.

Finally, I note this for the sheer prominence which it has commanded through the centuries of common law litigation. The Court observed that although the phrase 'costs to follow event' appears in the marginal note to s.168 of the 2015 Act, it does not feature in the section itself and has been purged entirely from the recast version of O.99 RSC. However, I doubt somehow that the phrase will be purged from the lips of judges, legal practitioners or litigants.

Clear contemplation

Recent developments in the law have clarified issues relating to wills made in contemplation of marriage.

Niall Gaffney BL

The recent decision of Allen J. in *The Estate of John McPartlan (Deceased)*[1] considers in depth the law surrounding section 85(1) of the Succession Act 1965, namely, the survival of a will made in contemplation of marriage. Section 85 provides that a will is revoked by the subsequent marriage of the testator, unless such will was actually made in contemplation of marriage.

Prior to the above judgment, the law surrounding the application of section 85(1) was primarily focused on the factual evidence adduced at the hearing of the application. Three Superior Court decisions[2] previously narrowed the issues and sought to define the applicability of the section. In his judgment, Allen J. defines ten principles to consider when assessing whether s.85(1) comes into play and assists in determining some of the criteria for considering what amounts to "contemplation of marriage".

Facts of the case

The facts of the case are set out in detail in the written decision; however, a brief summary can be given as follows:[3]

The deceased executed a will on June 18, 2019, which named his brother and sister as executors. In this will, the deceased left his home (No. 31 Ascal Ribh, Co. Dublin), which was owned previously by his mother, to his siblings. The deceased left the residue of the estate, of slightly greater value than the property, to his fiancée, Ms Graham.

What is clear from the factual background of the case is that the deceased always envisaged leaving 50% of his estate to his fiancée should he pre-decease her. Evidence was adduced at the hearing of the application that the parties had agreed, or at least the deceased envisaged, always leaving his home to his siblings.

The couple had been in a long-term committed relationship since 1996, but did not live together due to caring for their respective mothers. Both parties resided with their mothers while providing care to them. This gave rise to the importance of these properties remaining with the respective families. The deceased's mother died in 2014, and on the death of Ms Graham's mother in 2015, the couple moved in together into Ms Graham's mother's property at No. 40, Ascal Ribh, Artane.

The deceased was diagnosed with cancer in March 2019. While the

deceased was undergoing treatment, the expected outcome was good and evidence was adduced putting forward the deceased's positive expectation in respect of the treatment he was receiving. During this time, the deceased turned his mind to estate planning, and even received advice from his accountant to marry his fiancée.

A letter was sent to the deceased's solicitor wherein it was agreed with his fiancée that her mother's property (now hers) would remain in the possession of her family unless it was sold. It also stated that No. 31 would remain in his family. The deceased expected to sell his property at '70 years of age or so'[4] and clearly expected to survive his battle with cancer.

In July 2019, the deceased's health deteriorated rapidly, and on July 30 he was given a terminal diagnosis. Ms Graham's evidence was that until that point, there was no plan or arrangement to marry, and therefore no contemplation of marriage in the will of June 2019. This belief was partly grounded on the fact that no notice was given, so the couple could not legally get married. Furthermore, there was no agreement or arrangement of a venue, date or ceremony.

Given the deceased's terminal diagnosis, he asked again to be married before death; however, Ms Graham maintained that she did not want to get married under sad circumstances. On July 31, the couple set about making marriage arrangements. With assistance, a Circuit Court Order was obtained on August 7, 2019, dispensing with the formal notice requirements. The marriage took place in a hospice in Raheny the following day. Ms Graham's evidence was that she was told by the deceased "everything is yours now, I told you I'd look after you".[5]

The deceased died on August 12, 2019, having married Ms Graham on August 8.

What is clear from the factual background of the case is that the deceased always envisaged leaving 50% of his estate to his fiancée should he pre-decease her. Evidence was adduced at the hearing of the application that the parties had agreed, or at least the deceased envisaged, always leaving his home to his siblings.

Persuasive and binding jurisprudence

On the basis of the facts set out above, the Court was faced with determining the factual and legal question of what amounts to contemplation of marriage, and the facts to be considered and the weight attributed to same. The Court reviewed and considered an extensive list of judicial authorities in reaching its decision, including authorities and principles from Ireland,[6] England,[7] Victoria[8] and New Zealand.[9] The jurisprudence of these jurisdictions, which in the 1800s held almost identical laws to each other,[10] has significantly diverged since the commencement of s.85 (1). This section provides:

"A will shall be revoked by the subsequent marriage of the testator, except a will made in contemplation of that marriage, whether so expressed in the will or not".[11]

The formulation of s.85(1) comes from a combination of the above jurisdictions, based on the doctrine contained in s.18 of the Wills Act 1937. Where s.85(1) is unique is that it does not require an express inclusion of the contemplation of marriage in the will. Of the authorities considered, Allen J. examined the *ratio decidendi* of three Irish Superior Court cases. They are summarised as follows:

1. *Re John Baker (deceased)*:[12] Will made on April 23, 1951, and marriage solemnised on August 17,1954. The issue that arose herein was whether the Succession Act (which came into effect on January 1, 1967) applied to a will that was governed by the old s.18 of the Wills Act 1937. Section 18 dictated that any will was revoked on the marriage of the testator. The Court held that the will was revoked by the old legislation and was not re-executed.

2. *Re O'Brien (deceased)*:[13] The deceased made a will on October 29, 2008, leaving lands to his nephew and residue to his fiancée. Notice of intention to marry was given on July 31, 2009, and the couple were duly married. The Court held that there was no doubt that the deceased contemplated his marriage in preparation of the will, having previously given notice of his intention to do so. Of particular importance in this decision was the wording of s.85. Unlike its English counterpart, it does not expressly require the contemplation of marriage to be contained in the will. Instead, it acknowledges that such contemplation need not be expressly contained in any provision of the will. The fundamental divergence from the English jurisprudence is described as follows:

"… in the United Kingdom jurisprudence, the issue of whether the required contemplation was present when the will was made, remains primarily one of construction of the will, in this jurisdiction, the ascertainment of whether that contemplation existed or not is a question of fact to be established by evidence".[14]

The Court accorded particular weight to the difference between an intention to marry and the contemplation of marriage.

3. *Re McLaughlin (deceased)*:[15] The deceased resided in Rhode Island and was not domiciled in Ireland. Before marrying his wife, he made a will that dealt with the Irish property. Laffoy J. considered an important aspect of this case: what extrinsic evidence could be adduced supporting the deceased's contemplation of marriage? In finding that the will was not made in contemplation of marriage, the Court noted that the marriage took place more than three years after the will was

executed. This would rebut the statutory presumption that exists in Rhode Island. Laffoy J. appears to suggest that there is a requirement, when proving contemplation of marriage post will, for "clear and convincing"[16] evidence.

The Court underwent an interesting examination regarding the differences in approaches in England and New Zealand. In New Zealand, the intention to leave a gift to "my fiancée Mary" would suggest that this is not evidence of contemplation of marriage. Meanwhile, the UK decisions would suggest that it is.

The importance of engagement

"It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife".[17]

This (somewhat acerbic) opening line of Jane Austen's *Pride and Prejudice* is not the kind of contemplation that the Court will uphold. Such contemplation can only arise where it is in the mind of the testator, prior to the execution of the will, and said marriage has subsequently taken place.

Of importance to the Court's finding was the history surrounding the engagement. The couple became engaged in 2011 while on holiday together. A will was prepared by the deceased's solicitors shortly after the engagement in 2011, which recorded Ms Graham as the partner and fiancée of the deceased. Written instructions were given with the drafting of this will, which clearly envisaged the deceased's fiancée inheriting half of the estate, with the other half going to his mother/siblings (depending on whether the deceased survived his mother). Instructions even went as far as to contemplate the break-up of the engagement, leaving Ms Graham 25% of the estate. It appears that the deceased always intended for his siblings to inherit their mother's home.

The Court underwent an interesting examination regarding the differences in approaches in England and New Zealand. In New Zealand, the intention to leave a gift to "my fiancée Mary" would suggest that this is not evidence of contemplation of marriage. Meanwhile, the UK decisions would suggest that it is. Allen J. preferred the English approach, given the ordinary meaning of the term 'fiancée' and its related understanding of marriage. The Court held that it was bound by the decision in *O'Brien*, and further did not consider itself bound by the English jurisprudence regarding one's intention to not revoke the will by subsequent marriage.

Unilateral contemplation

In finding that the will was made in contemplation of marriage, Allen J. placed weight on a number of factual elements of the case. One of the factors of interest is Ms Graham's consistent affirmation that marriage was not contemplated at the time of the execution of the will. The Court, while noting these assertions, ultimately held that this was not a matter for her, but rather for the Court to decide. The test was summarised as "whether the testator, at the time he made his will, had in his mind, or had regard to, his marriage".[18]

The Court noted that it is not a requirement that this contemplation be reflected in the will. From an evidential point of view, the Court placed significant weight on the instructions given to the deceased's solicitor and the nature of the financial advice received. Furthermore, the requirement of contemplation of a particular marriage in the future is all that is required; it is not necessary to show the contemplation of a marriage on a particular date or within a particular timeframe.

Interestingly, the Court did not consider the acceptance of the marriage as a material fact that could undermine contemplation. As the Court put it: "Every suitor must contemplate marriage before asking, since, whatever the answer may be, that is the object of the proposal".[19] The Court held a number of factual occurrences to be immaterial to assessing whether marriage was contemplated prior to the signing of the will of June 2019, namely: the solicitor's advice regarding a new will post marriage; the failure to give formal notice of the intention to marry; and, the fact that a date was not fixed.

The costs of the application

The Court ruled that the will of June 18, 2019, was made in contemplation of marriage, and was admitted to probate. Interestingly, insofar as the costs of the application were concerned, the Court believed that the applicants were entitled to have their costs paid out from the estate, rather than ordered against the respondent, Ms Graham. However, on foot of the valid will, Ms Graham was entitled to the residue of the estate, which would of course bear the costs of the proceedings. In the view of the Court, an order for costs made little difference, and any application by the respondent for her costs would be purely academic.

Of importance to the Court's finding was the history surrounding the engagement. The couple became engaged in 2011 while on holiday together. A will was prepared by the deceased's solicitors shortly after the engagement in 2011, which recorded Ms Graham as the partner and fiancée of the deceased.

The criteria going forward

Allen J. helpfully compiles a list of applicable principles on foot of the numerous authorities considered within this judgment. The principles outlined consolidate the principle *ratio* of the three cited Irish cases above

and indicate the divergences from the English jurisprudence. The principles are as follows:[20]

1. The position of wills made in contemplation of marriage being an exception, the rule is that a will is revoked by a subsequent marriage. It follows that the person relying on the exception carries the onus of proof.
2. That onus is to show that the will was made in contemplation of a particular marriage, which is the subsequent marriage in contemplation of which the will was made.
3. It is sufficient to show that the testator had, or must have had, in contemplation, marriage to a particular person. That requirement is that the testator should have borne in mind or have had regard to a particular marriage.

Interestingly, the Court did not consider the acceptance of the marriage as a material fact that could undermine contemplation. As the Court put it: "Every suitor must contemplate marriage before asking, since, whatever the answer may be, that is the object of the proposal".

4. There is no requirement that the contemplated marriage should have been the motivating factor in the making of the will.
5. There is no requirement that the testator's contemplation of the marriage should be expressed in the will.
6. The requirement that the will should have been made in contemplation of "a particular marriage" means a marriage to a particular person. While wedding arrangements may provide evidence of the contemplation of marriage, there is no requirement that a date should have been fixed, or any arrangements made, or that notice should have been given. The relevant contemplation is the contemplation of a marriage, not of a wedding.
7. The survival of the will is a consequence of the application of s.85. There is no requirement that the testator should have intended that the will should remain valid notwithstanding the contemplated marriage. By the same token, any belief on the part of the testator that the will would be revoked by the marriage is not inconsistent with its having been made in contemplation of marriage.
8. There is no requirement in the section that anyone other than the testator should have contemplated the marriage. A proposal of marriage is made in contemplation of marriage. There is no room in the application of s.85 for a requirement that there should have been a proposal or an acceptance.
9. While it will readily be concluded that a testator who has, a short time before making his will, given notice of his intention to marry, had that marriage in contemplation, that is not definitive.
10. An engagement to be married is an agreement to marry. It is a matter of fact whether a will made by an engaged person is made in contemplation of marriage.

The above decision and judgment of Allen J. provides a welcome exploration of the factors and considerations of what will constitute contemplation of marriage in the context of probate and succession. Section 85(1) must be read and interpreted in harmony with the entirety of the Succession Act 1965, as has been done in this decision. The legislation, as a whole, introduced and offers extensive provisions and protections for spouses and children following the death of a spouse or parent. It is with these protections in mind that the importance of the contemplation of marriage and the survival of a will are made clear.

References

1. [2020] IEHC 447.
2. *Re Baker (deceased)* [1985] IR 101; *Re O'Brien (deceased)* [2011] 4 IR 487; Re *McLaughlin (deceased)* [2013] IEHC 156.
3. [2020] IEHC 447, paras 4-26.
4. [2020] IEHC 447 at para 20.
5. [2020] IEHC 447 at para 26.
6. [1985] IR 101; [2011] 4 IR 487; [2013] IEHC 156.
7. *Sallis v Jones* [1936] p 43; *In the Estate of Langston, decd*. [1953] p 100; *Pilot v Gainfort* [1931] p 103.
8. *In Re Chase, decd* [1951] VLR 477.
9. *Burton v McGregor* [1953] NZLR 487; *Public trustee v Crawley* [1973] 1 NZLR 695; *Re Whale (deceased)* [1977] 2 NZLR 1.
10. Wills Act, 1937.
11. S.85(1) of the Succession Act 1965.
12. [1985] IR 101.
13. [2011] 4 IR 487.
14. [2011] 4 IR 487, per O'Neill J., at para 35.
15. [2013] IEHC 156.
16. [2013] IEHC 156, Laffoy J., at para 41.
17. Austen, Jane. *Pride and Prejudice* (Egerton, 1813), chapter 1.
18. [2020] IEHC 447 Allen J. at para 62.
19. [2020] IEHC 447 Allen J. at para 65.
20. [2020] IEHC 447 Allen J. at para 59.

Opening the floodgates?

The Supreme Court decision in *University College Cork v Electricity Supply Board* represents an evolution in the principles governing liability in negligence at common law.

Ian Boyle Harper BL

In November 2009, the River Lee broke its banks causing significant flood damage to Cork City, including the campus of University College Cork (UCC). On July 13, 2020, the Supreme Court determined that a proximate cause of at least some of that damage was the operation of two upriver dams by the Electricity Supply Board (ESB) in the days leading up to the flood.[1]

The reasoning by which the majority of the Supreme Court reached this result represents an evolution in the principles governing liability in negligence at common law in this jurisdiction, and an extension of the circumstances in which public and private entities may be found to have a duty of care to provide their neighbour with a benefit, as opposed to merely refraining from causing them harm.

Giving the principal judgment for the majority of the Court, Clarke C.J. and MacMenamin J. (with whom Dunne J. agreed) concluded, *inter alia*, that:

- liability in negligence should be analysed on the basis of a "do no harm" approach, rather than by reference to the more traditional distinction between acts of commission and acts of omission;
- the "do no harm" principle may be subject to exceptions giving rise to a duty of care which require the conferring of a benefit; and,
- one such exception now recognised in this jurisdiction is where a party exercises a special level of control over an independently arising danger.

"2.10 … in simple terms, the principal contention put forward on behalf of UCC is that, in the days and weeks leading up to the critical events of that time, the ESB negligently left less scope or capacity in their reservoir system for water than should have been the case".

Background

The ESB operates two dams on the River Lee, which it uses to generate electricity in support of its statutory functions. Both dams are located upriver of Cork City and each facility comprises a dam, power station and reservoir. Following the flood in November 2009, UCC instituted proceedings seeking damages for negligence and nuisance against the ESB. In circumstances where the ESB had, during the flood period, actually discharged less water downstream towards the city than was flowing into their reservoirs, the core allegation in UCC's case against the ESB was summarised by Clarke C.J. and MacMenamin J. as follows:

"2.10 … in simple terms, the principal contention put forward on behalf of UCC is that, in the days and weeks leading up to the critical events of that time, the ESB negligently left less scope or capacity in their reservoir system for water than should have been the case".

In the High Court, Barrett J. found the ESB liable in negligence and nuisance.[2] The Court of Appeal (Ryan P., Irvine and Whelan J.J.) unanimously overturned the High Court's decision on liability, holding that:

"The High Court judgment if permitted to stand would represent a significant alteration of the existing law of negligence and nuisance, would be contrary to the statutory mandate of ESB in respect of electricity generation and would not be consistent with reason and justice".[3]

UCC sought and was granted leave to appeal to the Supreme Court,[4] with the Court observing in its determination that:

"The case addresses a number of issues including the liability of a dam operator in respect of persons or property downstream, the law relating to the existence of duty of care, the definition of any such duty and the liability of statutory undertakings both generally, and in the law of nuisance".[5]

While the majority of the Supreme Court ultimately held over any analysis of the law of nuisance,[6] the decision represents a material expansion of the circumstances in which a duty of care will be found to exist at common law in this jurisdiction.

The "do no harm" principle

The traditional starting point for any analysis of the existence of a duty of care in this jurisdiction is *Glencar Exploration plc v Mayo County Council (No.2)*.[7] *In UCC v ESB*, the ESB did not raise arguments concerning foreseeability or remoteness; instead, it contended that the only duty that a dam operator has to persons downstream was "not to worsen nature".

The Supreme Court considered that the crux of this dispute centred on what can be termed the "just and equitable" limb of the *Glencar* test, i.e., the requirement articulated by Keane C.J. that a court "take the … step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff".[8] In determining the proper approach to this limb of the *Glencar* test, the Court re-iterated the view, previously expressed in *Morrissey v Health Service Executive*,[9] that the wording of this limb of the Glencar test is not "of any great assistance" and "begs the question of how a court is to decide what is just and equitable".[10]

In order to frame its analysis on this issue, the Supreme Court took the helpful step of adopting, as follows, the recent UK re-casting of the vexed acts and omissions distinction that has traditionally permeated the principles of negligence in the common law world:

"8.15 … we would respectfully agree with the more recent case law of the United Kingdom which seeks to frame the issue in terms of a 'do no harm' principle, rather than the previous case law which tended to analyse such matters by distinguishing between acts of commission and acts of omission. The line between such acts can be very much a matter of interpretation. How do we analyse the failure of a motorist to slow down when approaching a dangerous bend or an incident on the road that would lead a reasonable driver to reduce speed? It might be said that, if one looks at the overall act of driving, then the motorist committed the act of driving in a negligent fashion by going, or at least continuing, at a speed which was too fast in all the circumstances. Alternatively, the very same actions (or failure to take them) could be characterised as an omission to apply the brakes. It is easy to see how such an analysis might lead to the sort of questions which Hardiman J. was wont to describe as theological. In those circumstances we agree that the 'do no harm' approach provides a more robust basis for analysis".

While the majority of the Supreme Court ultimately held over any analysis of the law of nuisance, the decision represents a material expansion of the circumstances in which a duty of care will be found to exist at common law in this jurisdiction.

The Court went on to adopt the following passage from the judgment of Lord Reed in *Poole Borough Council v GN*, outlining the benefits of the "do no harm" approach:

"Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm … In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply".[11]

While the Court noted, as will be seen below, that there are exceptions to this general approach, the effect of this reasoning is to set, as a guiding principle,

that unless a defendant's behaviour or circumstances fit into an accepted or acceptable exception, it will not be "just and reasonable" or "just and equitable" to impose a duty of care in the form of a positive obligation to confer a benefit, as distinct from a negative obligation to refrain from causing harm. The advantage of analysing any proposed extension of the duty of care through this lens is that it provides a more cogent means of categorising conduct than by reference to the somewhat artificial distinction between acts and omissions, the application of which may give rise to the strained characterisation of factual scenarios to which the distinction is ill suited.

Exceptions to the "do no harm" principle

In reliance on the recent UK Supreme Court decision in *Robinson v Chief Constable of West Yorkshire Police*,[12] UCC contended that the ESB fell within the following three potential exceptions to the "do no harm" principle:

- the ESB had a special level of control over the source of the danger;
- the ESB had assumed responsibility to protect downstream property owners from the risk of flooding; and,
- the ESB's status created an obligation to protect downstream property owners from danger.[13]

Ultimately, given the particular circumstances of the case, the Supreme Court only determined the question of whether there exists in Irish law an exception to the "do no harm" principle where a party has a special level of control over the source of the danger. The existence of the two other exceptions contended for has been held over for a more appropriate case.[14]

In endorsing the "special level of control" exception to the "do no harm" principle in this jurisdiction, the Court outlined the test for establishing such an exception as follows:

"In summary, we are satisfied that Irish law recognises the potentiality of a duty of care existing to prevent harm from a danger caused independently of the alleged wrongdoer where that alleged wrongdoer has a special level of control over the danger in question which is substantial and not tangential. That level of control does not necessarily have to arise from a legal power. However, in assessing whether any such duty of care arises in the circumstances of any individual case or type of case, a court must assess the following factors:

(a) whether there is a reasonable relationship between any burden which would arise from imposing such a duty of care and the potential benefits to those who may be saved from the danger in question; and,

(b) whether it is possible to define the duty of care in question with a sufficient, but not absolute, level of precision so as to avoid imposing a burden which is impermissibly vague and imprecise".[15]

It is clear that a central factor in establishing the existence of a duty of care under this exception is whether, on the facts of any given case, the defendant in question had a "substantial" level of control over the danger in question.

In finding that that threshold had been met in *UCC v ESB*, the Supreme Court stated that:

"The ESB is, therefore, able to exercise a significant degree of control over the flow through the dams and ultimately down river. It is, of course, the case that the ESB does not generate that flow itself. The underlying flow derives from nature. However, the ESB exercises a significant power over the natural flow which is undoubtedly capable of being deployed to potentially minimise the risk of adverse flooding events".[16]

By contrast, and among a number of issues raised in his dissenting judgment, O'Donnell J. noted that:

"… substantial as these dams are … they do not seem to me to make the ESB the master of the river or the controller of the situation … It is clear that nature still controls the fundamental elements of the equation beyond the power of the ESB, such as the contours of the river, the topography of the surrounding countryside, and the quantity, rate, and duration of rainfall".[17]

While the majority couched their analysis of the ESB's actions in terms of its "control" of the river, it is emphasised in the forceful criticism contained in O'Donnell J.'s dissent that many, if not most, of the features and aspects of the river (and indeed the rainfall and other relevant natural features) were outside of the ESB's "control".

Rather, it appears that what the ESB actually exercised was substantial influence rather than control over the source of the danger. It remains to be seen whether the majority judgment may be invoked in future cases to effect or justify a disguised relaxation in the factual standard required to impose a duty to confer a benefit. More broadly, while the Supreme Court held over the question of whether other exceptions to the "do no harm" principle exist in this jurisdiction, it is difficult to see the line being drawn at scenarios involving a "special level of control". Rather, it seems probable that the slow trickle of positive duties in negligence may well become a steady stream before long.

References

1. [2020] IESC 38.
2. [2015] IEHC 598.
3. [2018] IECA 82, at para.14.
4. [2018] IESCDET 140. The ESB was also granted leave to cross-appeal on the issue of contributory negligence. The cross-appeal has yet to be determined.
5. [2018] IESCDET 140 at para.4.
6. [2020] IESC 38, per Clarke C.J. and MacMenamin J. at para.14.12.
7. [2002] 1 I.R. 84.
8. [2002] 1 I.R. 84 at p.139.
9. [2020] IESC 6.
10. [2020] IESC 38, per Clarke C.J. and MacMenamin J. at para.8.12.
11. [2019] UKSC 25, at para.29.
12. [2018] AC 736.
13. [2020] IESC 38, per Clarke C.J. and MacMenamin J. at para.7.9.
14. [2020] IESC 38, per Clarke C.J. and MacMenamin J. at paras.11.3 and 14.12.
15. [2020] IESC 38, per Clarke C.J. and MacMenamin J. at para.11.18.
16. [2020] IESC 38, per Clarke C.J. and MacMenamin J. at para.12.1.
17. [2020] IESC 38, per O'Donnell J. at para.130.

Report on the Review of Administration of Civil Justice

It might seem a contradiction in terms but in order to save money, you often need to spend upfront to upgrade the infrastructure. We invest in an efficient heating system, so we can save on energy costs over time. And so too the Courts.

Maura McNally SC

The Bar of Ireland welcomes the publication of the Report on the Review of Administration of Civil Justice (Kelly Review), which provides comprehensive recommendations for change in court procedures. Any implementation will require amendments to legislation, rules of court and current practice, and will also require the continued involvement of bodies such as The Bar of Ireland.

Contrary to the erroneous narrative advanced by some, The Bar of Ireland has for many years observed that court procedures could be better streamlined to improve case management, thus leading to increased efficiency and enhanced access to justice. The necessity for fair and clear procedures, married with effective and constitutionally sound justice for all parties, has been, and always will be, the goal of The Bar of Ireland.

Our submissions to the Review Group made recommendations in a wide number of areas of practice and procedure, and we sought to give voice to the practitioner perspective, in consideration of the anticipated Implementation Group.

I would caution that the implementation of this Report will require the allocation of substantial additional resources and funding, if it is to achieve the aim of lasting productivity and performance gains for all involved in the judicial system.

Lack of funding

The issues considered by the Review Group cannot be divorced from the historical dearth of funding for the Irish court system. Investment is the key to achieving enhanced efficiency. This country has one of the lowest investment rates in the court system (per GDP) in the European Union. Ireland spends just €56 per inhabitant in its judicial system budget, compared to other European countries in the same GDP bracket who are spending almost €200. This has manifested itself in an under-resourced ICT capability and the fewest number of judges per capita.

Notwithstanding the differences between civil and common law jurisdictions, this is an alarmingly poor public service investment and the State is open to the accusation of shifting the cost burden of the judicial system to the end user.

Space does not permit me to elaborate upon how a creaking legal aid scheme is adding to the widening justice gap, a veritable chasm of unmet legal need. This 'gap' is ever growing, despite the best efforts of organisations such as FLAC, which the Bar supports. Nor can I elaborate upon the misconceived aim of some towards a leaned-down, single-click, one-stop-shop, remote legal system. This is a dream of some, but of little or no benefit to citizens entitled to constitutional and fair justice.

Court procedures must ensure fair procedures and equality of arms between litigants. For example, in the sphere of judicial review, the Review Group has recommended that the threshold for leave (the standard that must be reached for the High Court to permit the challenge to proceed) be modified to include a requirement that the applicant show a 'reasonable prospect of success'. In many cases, this may cause difficulty in practice, and indeed work in the favour of the State where important community and national issues require review. There is a risk of a David and Goliath situation arising.

The Council is of the view that this is one example of a proposed reform that will have to be carefully assessed before implementation, as we cannot allow for a two-tier legal system.

Data

The issue of legal costs in Ireland continues to undergo significant consumer-focused reforms. It is a positive development that the Kelly Review endorses and supports the initiatives contained within the Legal Services Regulation Act 2015 and these provisions must be allowed to take effect in the normal course.

However, a crude and rigid approach to the management of legal costs can give rise to a number of perverse incentives impacting negatively on litigants and creating an inequality of arms, particularly those litigating against the State and other well-resourced parties. Given the starved legal aid system, serious concerns arise in respect of access to justice, where litigants are effectively dissuaded from vindicating their rights.

The recently published Action Plan for Insurance Reform calls for, among other things, the increased use of the National Claims Information Database Reports and Office of the Legal Costs Adjudicators data, corresponding with Programme for Government commitments. Placing a focus on local and real-time data is welcome. Representatives of the Council recently met with Sean Fleming TD, Minister of State at the Department of Finance, on the issue of insurance reform and we look forward to contributing to ongoing discussions, so that a balanced assessment can be undertaken by the Government.

The Kelly Report – all 90 recommendations, 12 chapters and 474 pages – requires careful analysis. Any practical reform will require substantial consultation and a consideration of the perspective of all those who participate in the court system. To that end, the Council looks forward to actively participating and engaging with the Implementation Group, the judiciary, the Courts Service and the Department of Justice and Equality on the published recommendations.

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