THE BAR OF IRELAND
The Law Library

THE BAR REVIEW

Journal of The Bar of Ireland

Volume 25 Number 1
February 2020

Social media, privacy and evidence

NEW TITLE

Internet Law

By Michael O'Doherty

Ireland is home to the European headquarters of many international IT and tech firms such as Google, Facebook, LinkedIn, Amazon and Twitter. As such, key cases involving these firms are being played out in Irish courts.

In addition, the law in Ireland regarding causes of action involving the internet is a rapidly growing area of law and litigation. This book examines issues such as defamation, data protection, e-commerce and intellectual property through the lens of the internet.

Internet Law by Michael O'Doherty looks at key pieces of legislation such as the EU General Data Protection Regulation and Defamation Act 2009; forthcoming legislation such as the Harmful Digital Communications Act; and the EU ePrivacy Regulation, which aims to ensure stronger privacy rules for all electronic communications.

Key cases discussed in this title include:

- *Schrems* v *Data Protection Commissioner*
- *Savage* v *Data Protection Commissioner & Google Ireland*
- *Sony Music* v *UPC*
- *CG* v *Facebook*

€225

February 2020 | 9781526508010

Bloomsbury Professional Ireland

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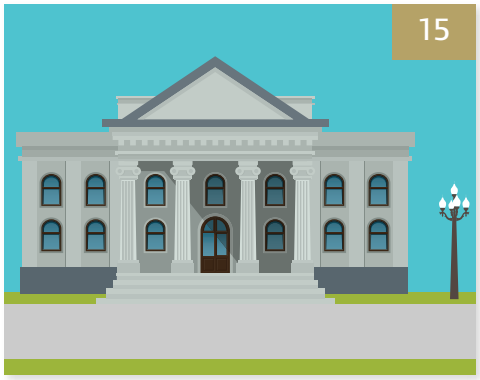

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General Election 2020 – Safeguarding Justice

The Council and its committees continue to work on behalf of members.

At the time of writing, the General Election campaign is well underway. The Bar of Ireland issued an Election Bulletin to candidates, political parties and Government departments as part of our Safeguarding Justice campaign, which calls on the next Government to prioritise investment and policy action in four key areas:

1. Safeguarding the constitutional right of access to the courts.
2. Safeguarding access to justice through legal aid.
3. Allocation of appropriate budget to develop a dedicated Family Law and Children's Court at Hammond Lane.
4. Promoting Ireland as a leading centre for international legal services.

Barristers, as advocates, play a vital role in safeguarding justice by: defending the independence of the courts and securing their efficient functioning; promoting the rule of law; and, affording effective and equal access to justice for all. However, constricting budgets are making it harder for practitioners and the courts to do their work, and too many people are unable to access justice quickly or effectively. The Bar of Ireland Election Bulletin appeals to the next Government to prioritise investment and policy action in safeguarding justice.

Business of the Council and committees

There is an enormous amount of work ongoing among the Council and its committees, including:

- finalisation of a submission to the Law Reform Commission in response to the 'Issues Paper on Capping Damages in Personal Injuries Actions';
- establishment of an in-house fee recovery and information service to work alongside LawServ to provide support for members in practice management and recovery of professional fees outstanding;
- continued publication of the new 'Ethical Toolkits' that have been prepared to assist members of the Law Library to decide what action, if any, they should undertake in circumstances where they face an ethical issue relating to their professional conduct – these are available for members to access on the members' section of the website;
- consideration of the report of the working group established to set out recommendations on how to implement the motion passed at the 2019 AGM that provides: "Masters shall ensure that pupils under their supervision receive a sum of no less than the amount required to pay for the pupil's Law Library entry fee, annual subscription fee and professional indemnity insurance";
- ongoing work with the Legal Services Regulatory Authority, including responding to consultations, compliance with Section 150 notices, providing information for members as it becomes available on the approach of the new Advisory Committee on the grant of Patents of Precedence, etc.;
- continued lobbying for the restoration of professional fees for barristers who undertake work on behalf of agencies of the State; and,
- implementation of a suite of actions in response to the 'Balance at the Bar' member survey.

This list is only a glimpse of the work underway by the Council and its committees to improve the working life of members of the Law Library. Members can read a summary report of each Council meeting on the members' section of the website.

Justice Week 2020

This year, the Council has decided to pilot a new initiative – Justice Week 2020. The background to this initiative arose from an idea led by the Bar Council of England & Wales in 2018 to promote access to justice and the rule of law. The campaign is known as 'Justice Week'. Following on from the success of their first Justice Week, which took place in the UK in November 2018, it was agreed to invite the profession across the four jurisdictions (Scotland, Northern Ireland, Ireland, and England & Wales) to join in with Justice Week 2020. Its aim is "to improve access to justice by boosting the profile of justice and the rule of law, placing them at the centre stage of public and political debate". Justice and the rule of law are facing major threats, from cuts to spending to attacks on the judiciary, and this undermines our democracy. Justice Week 2020 will be aimed at the under 25s to improve their understanding of the importance of the justice system, the value of the rule of law, and seeing them as fundamental to our lives and freedoms. A series of events has been organised by The Bar of Ireland during the week of February 24-28, 2020, and details will be available for members across all communication platforms. If you can, please support our social media activity that week. #JusticeWeek

Annual Conference Lisbon 2020

Planning is well underway for the 2020 Annual Conference, which will take place on Friday and Saturday, June 5-6, 2020, in Lisbon, Portugal. The conference is taking place during the Whit Vacation to maximise attendance. The theme of the conference is 'Rule of Law: Threats to Democracy', and it promises to be a very interesting session. Further information on the event is available via *In Brief* and the full programme of speakers will be published in the coming weeks.

Speaking of conferences, many members will be aware that the International Council for Advocates and Barristers (ICAB) holds a conference every second year hosted by one of the independent referral bars around the world. In 2020, the ICAB World Bar Conference will take place in the Murray Hotel in Hong Kong on April 8-9. The ICAB is the only dedicated forum for members of independent referral bars around the world. One of its key functions is to organise a conference every two years for representatives of independent bars to discuss matters of mutual interest and concern. Since its establishment in 2002, nine conferences have taken place. Representatives of the Council of The Bar of Ireland will attend the World Bar Conference 2020 in Hong Kong, and as many members of the Law Library as possible are also urged to attend. Further details are available via *In Brief*.

Micheál P. O'Higgins
Chairman,
Council of The Bar of Ireland

European insight

Ireland has been part of the EU project now for almost 50 years, a time of radical change, spanning German reunification, enlargement and the exit of our closest neighbour, the United Kingdom. Catherine Day has been at the heart of this project for most of that period, capping off her extraordinary career with a decade-long stint as Secretary General of the Commission. In this edition, she shares with us her insights on the inner workings of the EU Commission and the values that underpin the dream of European unity. Back in Ireland, Ms Day has taken up a new challenge and she also discusses her plans for the Citizens' Assembly on Gender Equality, which she now chairs.

On a more sombre note, the courts now have to grapple with how best to conduct the trial of children who are accused of serious offences such as murder. Through the lens of the trial of Boy A and Boy B, we examine the special measures taken by investigators, lawyers and judges to ensure that the special needs of young accused are met so as to ensure a fair trial. Elsewhere, we analyse the use of evidence gleaned from social media in the courts and assess whether any privacy rights are infringed through the use of that information. Finally, we carry an analysis of the types of cases that cross the constitutional hurdle for securing leave to appeal to the Supreme Court.

Eilis Brennan SC
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Purple Lights Campaign

To celebrate the UN International Day for Persons with Disabilities on December 3, 2019, The Bar of Ireland illuminated the Church St and Distillery Buildings in purple in support of persons with disabilities. Run by the Disability Federation of Ireland, the National Purple Lights Campaign is now in its second year and sees Government buildings, major companies, and civic and educational institutions all turning purple.

Courting Disaster campaign launched

A number of organisations, including Barnardos, the Children's Rights Alliance, Community Law and Mediation, the Dublin Rape Crisis Centre, the Family Lawyers Association of Ireland, FLAC (Free Legal Advice Centres), the National Women's Council of Ireland, One Family, The Bar of Ireland, The Law Society and Women's Aid came together to launch the Courting Disaster campaign in December 2019, calling on the Government to immediately allocate the funding required to develop a dedicated Family Law Court at Hammond Lane in Smithfield in Dublin.

A properly functioning courts system is essential to providing access to justice. However, some of the most vulnerable members of society seeking to resolve family law and childcare proceedings are faced with wholly unsuitable court facilities in archaic conditions where not even basic needs are met, such as separate waiting areas, family-friendly spaces, and consultation rooms to allow for privacy in these most sensitive of cases.

The construction of dedicated Family Law Court facilities has been agreed in principle for some time and the site at Hammond Lane is ready and waiting; however, agreement has yet to be reached on its structure and funding. This ongoing failure to commit the necessary resources gives rise to a significant and serious risk that the existing system cannot adequately protect the rights of individuals or children participating in family law proceedings, and is inhibiting access to justice for some of the most vulnerable members of our society.

The Courting Disaster campaign echoes the recommendation of the Joint Oireachtas Committee on Justice and Equality Report on Family Law Reform (October 2019) that the necessary funding be allocated to ensure that the construction of a purpose-built family law complex is commenced as a matter of urgency. The campaign now calls on the next Government to make the necessary funding available without any further delay so that the deficiencies in the current family law system can begin to be addressed.

A number of other organisations have since joined the campaign, including Aoibhneas, Rape Crisis Network Ireland (RCNI), SAFE Ireland, Sonas Domestic Violence Charity, and Treoir.

Pictured at the launch of Courting Disaster at Hammond Lane in Smithfield in Dublin, where it is proposed the family law court be constructed, are (from left): Gillian Dennehy, Women's Aid Ireland; Noeline Blackwell, Dublin Rape Crisis Centre; Keith Walsh, Law Society of Ireland; Eilis Barry, FLAC; Micheál P. O'Higgins SC, The Bar of Ireland; Nuala Jackson, Family Lawyers Association of Ireland; Orla O'Connor, National Women's Council of Ireland; Rose Wall, Community Law and Mediation; Tanya Ward, Children's Rights Alliance; Karen Kiernan, One Family; and, Freda McKittrick, Barnardos.

Lawyers Against Homelessness supporting the Capuchin Day Centre

Lawyers Against Homelessness is a collaborative effort between members of the Bar and the solicitors' profession to raise money for the Capuchin Day Centre through a series of CPD seminars.

Following its seventh event, which took place in December 2019, this effort has raised a total of €165,000 over the course of all seven seminars, 100% of which goes straight to Brother Kevin.

In a letter of gratitude, Brother Kevin thanked the legal community for its support, saying "without the kindness and support of people like your good selves it would not be possible for us to continue to provide the same high standard of help and assistance to the most needy and vulnerable in Irish society".

Every day the Centre provides over 300 breakfasts and 600 dinners, as well as distributing 1,800 food parcels each week. It also provides medical, dental, optical and personal hygiene facilities.

The events award four CPD points to solicitor and barrister attendees.

Previous speakers have included: the Attorney General; members of the judiciary (including Chief Justice Frank Clarke, Mr Justice Bernard Barton, Mr Justice Kevin Cross, Ms Justice Mary Irvine, Ms Justice Marie Baker, and Mr Justice Sean Ryan); and, contributions from senior and junior members of the Bar and law firms.

The next event will be held on March 26, 2020, from 3.30pm-7.30pm in the Capuchin Centre, and all colleagues are invited to attend, donate or speak at the event.

For more information, please contact committee members Constance Cassidy SC, Arthur Cush BL or Sophie Honohan BL.

Constance Cassidy SC and Brother Kevin address the Lawyers Against Homelessness event.

From left: Mr Justice Kevin Cross; Constance Cassidy SC; and, Edward Walsh SC.

Earlier Court of Appeal hearing dates

With the assignment of new judges to the Court of Appeal, additional time has now become available in 2020 for the hearing of appeals.

Parties in cases who have been allocated hearing dates in 2021 and who are interested in being allocated a hearing date in 2020 may apply to the judge taking the Directions List on any Friday in term for the allocation of an earlier hearing date.

Notice of any such intended application must be given to the Registrar (via email to courtofappealcivil@courts.ie) and to any other party to the appeal by close of business on the preceding Tuesday.

There is no Directions List on February 14, 2020, or March 20, 2020.

If the available dates in 2020 are not fully allocated as a result of this facility, it may be that there will be a callover of appeals listed for hearing in 2021 for the allocation of 2020 dates.

Immigration, Asylum & Citizenship Bar Association

Pictured is the keynote speaker with the IACBA steering committee (from left): Patricia Brazil BL; Michael Conlon SC; Eleanor Sharpston QC, Advocate General, CJEU (keynote speaker); Denise Brett SC; Niamh O'Sullivan BL; and, Aoife McMahon BL.

The inaugural conference of the Immigration, Asylum & Citizenship Bar Association took place in the Distillery Building on Friday, November 29, chaired by Mr Justice Donal O'Donnell. Over 140 attendees, representative of the wide reach of interested stakeholders, enjoyed the keynote address delivered by Advocate General Eleanor Sharpston QC of the Court of Justice of the European Union (CJEU), together with the stimulating contributions of Brian Kennelly QC, Nuala Butler SC, Siobhán Stack SC, Patricia Brazil BL, and Denise Brett SC, IACBA Chair, highlighting the topical and thought-provoking issues of both EU and national law in this area. The Association was formally launched with the Conference.

IACBA membership is open to all Law Library members at www.iacba.ie.

Sports Law Bar Association

The Sports Law Bar Association Winter Conference took place in the Gaffney Room on Friday, December 6. The theme of the conference was 'Breaking the Rules: Discipline & Governance in Sport' and it was opened by Mr Justice David Barniville, who was the founding Chair of the Association.

The Governance Panel, chaired by Paul McGarry SC and joined by Michael Collins SC, discussed the appropriate governance model that is expected of sporting bodies, in particular by their funding bodies, membership and the public.

Experienced in-house counsel Cliodhna Guy of the Irish Horse Racing Regulatory Board spoke of the evolving environment and how sports in Ireland are governed by and must comply with the Governance Code for Sport.

Sylvia Schenk, a member of the Daimler Advisory Board for Integrity & Corporate Responsibility and Court of Arbitration for Sport (CAS) Arbitrator, gave practical examples of minimum governance requirements (such as term limits and the need for sport to appoint independent board members who can offer an external viewpoint), while also recounting some of her own personal experiences within the structure of sport governing bodies.

Mark Tighe of *The Sunday Times* joined the conference later directly from the FAI EGM in Abbotstown and spoke about the events that led to the EGM, the importance of whistleblowers in sport, and the need to provide them with an avenue to safely raise concerns without risk to their employment or standing.

The Disciplinary Panel, chaired by Susan Ahern BL, focused on the recent Rugby World Cup in Japan, and the implementation of the new decision-making framework for high tackles. Donal Courtney, the former international rugby referee, and Yvonne Nolan of World Rugby were freshly back from Tokyo where they were involved in different facets of the disciplinary process. John O'Donnell SC and the Leinster, Ireland, and British and Irish Lion Malcolm O'Kelly completed the Panel.

The Panel discussed the role of discipline in the sport, how it has evolved over the past two decades, why it is a core requirement for a contact sport, and the effect the latest framework had on the Rugby World Cup tournament and its likely effect on the shape of the sport and its disciplinary regime into the future. The general consensus was that the game today is much cleaner and more disciplined than ever before, not least because of safety concerns, the fact that ill-discipline loses matches, and the number of cameras that are pointed at the pitch.

A duty of optimism

Former Secretary General of the European Commission Catherine Day speaks about her belief in European values, and the challenges facing Ireland in a post-Brexit Europe.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Catherine Day's interest in Europe goes back to her time studying economics and politics in UCD, where the late Garrett FitzGerald was her tutor: "He enthused all of the students that he taught with his idealism about how important and wonderful the EU would be. In my view, anyway, he proved right!" Catherine went to Brussels in 1979, only six years after Ireland and the UK (along with Denmark) became the first enlargement of the then EEC, and went to work in the Directorate-General (DG) Internal Market and Industrial Affairs. After an outstanding career (see panel), in 2005 she became the first female Secretary-General of the Commission, a post she held for a decade.

Behind the veil

Irish people consider ourselves, in general, to be very pro Europe, but we're not very well informed about exactly what happens in Brussels and how the Commission operates. Catherine undoubtedly has a unique insight into and knowledge of those inner workings, and the levels of diplomacy required to keep the complex machinery of the Commission running smoothly.

The office of the Secretary-General, unsurprisingly, is at the centre of this: "I describe it as the link between the political level, which is the Commissioners, and the permanent staff of the Commission. You work closely with the President of the Commission, but you are one of the channels through which the President and the Commissioners send their priorities – and express their satisfaction or dissatisfaction – to the staff.

"The role of Secretary General changed over the years, especially with the Lisbon Treaty [after which] the role of the Commission President became more presidential. I felt that the Secretariat General had to become much more like a prime minister's office to support the President in his (as it was then) role of being the centrepoint".

Catherine paints a picture of constant and complex negotiation and compromise, where 'getting the job done' inevitably takes time. She is aware of course that a frequent criticism of the EU is that its systems are desperately slow moving. For Catherine though, this represents a fundamental misunderstanding of what the EU is about: "My time in the EU has taught me the value and the honour of compromise. It's not altruistic; it's very realistic. The reason why the EU always goes the extra mile is, first of all, it sees itself as a family, so you always make an extra effort to keep the family together. But also because you want people to agree so they will go home and implement afterwards".

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Making history

Catherine's career has been wide ranging; however, one project stands out, and it is the one of which she is personally most proud. Throughout almost a decade in the DG External Relations, Catherine was deeply involved in, and indeed is regarded as one of the architects of, EU enlargement: "I think there are very few times in a person's life when you can really say: 'I was involved in something that was history in the making'. It was tremendously motivating to work with those countries and see how singleminded they were, how determined to do whatever it took. And for us and for them, it was about righting the wrongs of history. Europe shouldn't have been divided after the Second World War in the way that it was. This was the chance to give people the free choice to decide their own destiny. And all of them realised, I think, that they couldn't go it alone and that the EU, in which you freely chose to join and where all members are respected and represented, was the right way to go".

She acknowledges the recent tensions with countries such as Hungary and Poland, but is unequivocal in her belief that enlargement has been positive: "My reflection now is that I didn't realise that it takes much longer to change a political culture than an economic culture. And of course, we focused mostly on the economic and legal. However, the EU today is much more a force to be reckoned with internationally, for all its weaknesses and failings, because we represent 450 million people (after Brexit). You have to be big to be at certain tables to advance or defend your interests".

Catherine also believes strongly in an EU of shared values, and this is a topic she returns to several times: "I think one of the things that appeals most to young people, and to me, is that Europe does stand for certain values. And they are under threat everywhere else. I think it's one thing that will keep the population of the UK close to mainland Europe, so to speak, in the future. Certainly the United States, as it's currently behaving, I don't think reflects the values of many young Brits, not to mention young Europeans. That external pressure and threat to our values of openness and freedom of expression, as well as in free trade and the more economic areas, will in a sense be a new glue to keep the EU relevant to people's lives".

The elephant in the room

For the last three years, every conversation about Europe and politics has contained speculation about Brexit. Now that the UK's departure has taken place, the process of negotiating the oft-mentioned 'future relationship' begins. For Catherine, there is simply no choice – there must be a relationship and it must work: "It's overwhelmingly in everybody's interest that we work to build a very close relationship, and I believe the EU is willing to offer that. But it very much depends on what the British representatives decide they want".

She is frank about what's in play: "What [the British] haven't, I think, come to terms with yet is that you have to give to get. At the moment they're setting their sights very low: minimalist trade. I really hope that British business, trade unions, etc., will come out of the woodwork and express the view that they want a much closer, deeper relationship. You can't change geography. They are in Europe. So for me, the question is, do we, do they, face up to that and negotiate something that's good and deep early, or do we go the long and more costly and difficult way round?"

Does she think a trade deal can be done in 12 months, as claimed by the UK administration?

"No. Not the kind that I would like to see. A very, very minimalistic one, yes, but that would be no good for anybody."

Individual member states are also likely to have more to say in these negotiations, which will create further complications: "The Commission and the member states agreed very early on in the withdrawal negotiations that we had three collective points: our citizens, Ireland, and the budget. But now every member state is going to have a view on tariffs or the kind of trade rules they want".

She is clear that the UK has more to lose in these negotiations than the EU: "Anybody briefed in the UK knows it. You can deny that the earth is round as much as you like, but it's still round".

Fearmongering

The collective points that Catherine talks about have of course been central to the discourse on Brexit in this country. Would the EU stand by Ireland on the issue of the border? Would a small country's interests be protected and valued? It's been a great relief to many of us that our fears on this score were not realised, but Catherine thinks this fear was in part a result of the misunderstanding of the EU project that we discussed earlier, some on Ireland's part, but a great deal on the part of the UK: "I think the Brits always thought we would be dropped in the end, the same way that they thought the Germans would always come to their rescue, which was a profound misunderstanding of the EU. No matter how difficult a member is, they are still a member. The family analogy is a good one. There are dysfunctional families, but it takes an awful lot before they would let a family member down on a vital issue".

A life in Europe

Catherine Day has a degree in economics and politics, and a master's in international economics and trade, from UCD. After a short period working in Dublin she travelled to Brussels and began work in the DG Internal Market and Industrial Affairs.

Over the following years she worked in the Cabinets of such luminaries as Peter Sutherland and Sir Leon Brittan, before moving to the DG External Relations in 1996, where she was a central figure in the enlargement of the EU to 28 countries.

In 2002 she was appointed Director General of the DG Environment, where she served until 2005, when she became the first woman to serve as Secretary General of the Commission, a position she held until her retirement in 2015.

She cautions that Ireland won't find the same level of unmitigated support in trade negotiations: "When we're saying on one or the other trade issue 'Oh this is terribly important and we can't have a tariff on this', I don't think we'll always get the same tender treatment, but it isn't of the same importance as the withdrawal agreement".

It comes as no surprise that Catherine does not fear further fragmentation of the EU post Brexit: "I think that's a myth the Brits have fostered because it would comfort them. But also because having left, they don't want it to succeed in the same way that Trump and Putin don't want the EU to succeed. They don't want to have to deal with a powerful bloc that is coherent, to the outside world anyway. I say this so emphatically because I've sat through the all-nighters in the Euro crisis when prime ministers were on their own, when they knew that taking the decisions they had to take would probably cost them an election, or would certainly be difficult domestically. But as dawn came and decision hour approached, you could see them all saying: OK. Even more important than this difficult decision is: the EU has to survive. That's why I believe so passionately that it will survive".

Donning the green jersey

Catherine praises the Irish diplomatic work around Brexit, but says we can't stop now: "They did a very good job. I think it was a triumph of Irish politics and diplomacy, because they mobilised, and they travelled everywhere. They sat down and explained the situation in a way that I think has never been done before. We will have to maintain something of that in the future because we will be in all the more need of explaining ourselves to others".

So how do we forge a new role for ourselves in the absence of our closest ally? "I think we're going to have to work earlier on what we want the EU to do and not to do, on building alliances. We're not in any obvious geographic grouping, but that can be an advantage. For example, on agriculture we'll ally with France, and on other things we'd be allying with the small open trading country mindset. All the small countries are now realising that they're going to have to interact much more and work together. But I think Irish people are good at that, good at establishing social contact, getting on with people."

She talks about mobilising not just political networks, but business, education, and ex-pat communities (including communities here such as the large Polish community) as crucial to this process. But it's also about learning to look outwards: "We're going to have to be more interested in other people's views and problems. One of my hobbyhorses is that we're very much in the English-speaking bubble here. We don't really follow what goes on in continental Europe. We're going to have to understand what it is that's worrying the Danes, the Greeks, the Spanish, the Portuguese, the Poles".

"What [the British] haven't come to terms with yet is that you have to give to get. At the moment they're setting their sights very low: minimalist trade. I really hope that British business, trade unions, etc., will express the view that they want a closer, deeper relationship.

It's about learning to be strategic and tactical: "We can't win every battle. We have to pick the ones that are very important. But if you're going to concede on one, see can you get something for it before you concede".

One pertinent example of this is the fact that Ireland and Malta are now the only common law jurisdictions in the EU, something that The Bar of Ireland has long been aware of. Catherine acknowledges the importance of this: "I understand that the UK did a lot of the common law thinking and we piggybacked on it. The continental civil law is much more regulatory, so we will have to make ourselves the voice of those who don't want to regulate everything in sight. We would have some support with the Dutch and the Nordics, but somebody would have to express it".

What now for Europe?

Catherine lists the budget as the immediate concern for the EU. After that comes the need to find a common approach to migration. She describes the current lack of an EU-wide approach as "a poison in the political system". Climate change and wider economic concerns are also key priorities: "The engine of growth needs to be looked after and made more sustainable. The Euro still needs to be built up to make it more crisis resistant".

Many commentators have said that the climate crisis cannot be addressed without a major recalibration of economic policy away from constant expectations of growth. As a former DG Environment, who carried her experience in this area into significant policy change as Secretary-General, Catherine agrees: "That's been clear for some time. You have to look at it more responsibly. You also have to ask what is growth for? And I think the problem of inequality, growing inequality, is a big one. Although globalisation has brought problems, it has lifted billions of people out of poverty, so it's been a very good engine for progress, and human values. But it hasn't been an unmitigated success. And the problem is that the winners, who are in the majority, have just taken the wins and those who've been left behind or lost out have not been compensated. I think that [new EU Commission President Ursula] von der Leyen's programme shows that she understands the need to address that. That's a very EU thing, to try to find a way to compensate those who lose from change. That's why we have structural funds. It's why we have social policies, and frankly the British have been a big brake on that for most of their membership. So I think there will be more room now to develop social policy. It's one of the few advantages I see in their departing!"

"We're going to have to be more interested in other people's views and problems. One of my hobbyhorses is that we're very much in the English-speaking bubble here. We don't really follow what goes on in continental Europe. We're going to have to understand what it is that's worrying the Danes, the Greeks, the Spanish, the Portuguese, the Poles".

I ask Catherine what, if she could wave a magic wand, would be her priority. She returns to a topic we have discussed before: "I would like to see a greater emphasis on values. What is it that makes us different as Europeans? I think it's our values. We do care about the environment. We do care about human rights. We do care about freedom of media. We're not perfect. We fall off the pedestal regularly, but we still want to be there".

She says that one of the proudest moments of her career was being in Oslo when the EU won the Nobel Peace Prize in 2012: "That came at a really dark time for Europe. A lot of people were saying that the EU would not survive the Euro crisis. But it was a message from the Nobel Committee to say 'the rest of the world needs your model so keep going'. And that's why I think the core values are important".

It's an eternally optimistic view, and for Catherine that isn't a term to be used lightly: "They used to say in the Commission: 'You have a duty of optimism'. You can't give in to your pessimism! Eyes wide open and realistic, but you have a duty of optimism, a duty to think you can make it work".

The road to gender equality

Catherine's post-EU career has recently taken a very interesting turn, as Chairperson of the Citizens' Assembly on Gender Equality. The Assembly had its inaugural meeting in January, and a series of meetings will take place until July, after which its recommendations will be presented to Government. One of the reasons Catherine accepted this new role is her keen interest in the citizens' assembly model: "One of my frustrations is how do you get the mythical ordinary citizen to understand something of the complexity of, for example, the EU, and this seemed to me a great device for giving people access to high-quality information, and enough time to see connections and talk things through. And then, of course, being a woman, and having been a woman in a man's world to a large extent, I was and am very interested in the whole question of gender equality".

This will be more complex than previous assemblies, which were convened to deal with more specific issues, such as marriage equality. The assembly on gender equality is as much about figuring out the right questions as it is about finding the answers: "What I would like to get out of it is to hear what the citizens think are the next important gender equality issues".

She is very conscious of the extremely broad social implications of the process: "It's about gender equality, so it's not only about women's issues. Inevitably we will focus a lot on women's situation because they are the ones who don't have equality with men. But I think it's very important that the men who come along feel equally comfortable in expressing their views. It's only if it's seen as a common societal good for both men and women that we will move further down the road towards gender equality".

She feels very positive about assembly's prospects: "We can make recommendations, so we have to say to citizens: what do you want to tell the politicians that you want? And that's been the really exciting thing that's come out of previous ones: people did find a way to tell the politicians what they want. And on the previous occasions to show that they were actually ahead of where the conventional wisdom was".

As Catherine says herself, she spent her entire career in a very male-dominated sphere. She is anxious not to conflate her views as Chairperson with her personal views, but is in no doubt of the difficulties women have faced and continue to face: "I think women are still listened to differently, and also have to maybe work harder. Now having the status of Secretary General means people have to listen to you, because you have authority and you are speaking on behalf of an institution. But you also have to find your way in that largely male world, to interact and connect in a way that you can be part of it, but still be a woman. I mean, on a very simplistic level, I almost always wore skirts or dresses. I never wore trousers because I wanted to kind of subtly make the point that I am a woman in this world".

The very fact of having to think about something like dress or appearance as a way of consciously navigating one's professional sphere because of one's gender, is a subtle but very telling point: "The expectations are so difficult and so different. Instead of the effort going into 'am I up to speed on this issue, and how am I going to field all these impossible questions?' But it's relentless and punishing at that level anyway; I'm lucky I have a lot of stamina".

Paul Anthony McDermott SC

In December 2019, at the end of the solemn and beautiful Requiem Mass offered for Paul Anthony McDermott in his beloved University Church, the huge congregation mourned silently the death of a wonderful person.

From a very early stage as a student in UCD, Paul was identified and appreciated by his contemporaries as an outstanding debater. Side by side with his capacity to entertain the masses, Paul also flourished at a very early stage in academic life. His searchlight intelligence and intellectual curiosity infused his approach towards his academic studies. He was swiftly recognised by his teachers as a person of exceptional ability. His academic prowess led him inexorably to receive a master's degree from Cambridge and a doctorate from NUI. Although many of his contemporaries at UCD regarded him as a great entertainer and comic genius, he was at heart a deeply serious person.

Paul commenced practice at the Bar in 1997. As his practice developed and he became intensively busy, he always maintained time for the university. He was one of those rare barristers who managed to combine a life as a busy barrister and at the same time to pursue an outstanding academic career. That balance was a very important element of Paul's life. Paul was an exceptional teacher. His pedagogic gifts were put to good use in his life as a barrister. He had a tremendous capacity to listen to and empathise with his clients, to advise them wisely, and to defuse moments of high tension with his rich, impish sense of humour.

Paul had an intense interest in people, and a sense of joy and wonder about the world. He was an omnivorous reader of books. His daily conversations involved a constant cycle of animated discourse with his friends and colleagues about every possible subject in life, politics and the law.

Sir Walter Scott once wrote that: "A lawyer without history or literature is a mere mechanic". Paul was no mechanic. As a junior counsel, he impressed all who came across him by the intensity of his work and his problem-solving brilliance. He was also very competitive and relished the challenge posed by difficult cases. It was no surprise that the State looked so often to him for assistance in moments of crisis in the fields of administrative and constitutional law.

His legal practice was extremely broad. He prosecuted and defended criminal cases. He participated in many significant administrative law and constitutional cases. He also practised in the field of commercial law. The interpretation of the law and its application to the lives of others presented him regularly with complicated Rubik's cube-type legal challenges, which he was only too happy to try and solve.

Notwithstanding the punishing pace he set for himself in his work as a barrister, he continued to write books and articles, and to teach.

Many of the solicitors who briefed Paul considered him to be omniscient. They knew that they could rely upon him for advice in almost every possible subject. They admired him for his academic and intellectual brilliance, but they loved him for his personal empathy, kindness and consideration.

Spreading knowledge

In addition to his prodigious work rate, Paul also had a further gift. As a commentator on television and radio he was quite remarkable. It was a very important part of Paul's personality that he sought to share his knowledge with others.

Media broadcasts gave him an unparalleled opportunity to do so. This was always for the purpose of spreading knowledge, explaining complicated legal issues, and helping people to understand with greater clarity what the law meant to them and how it affected their lives. His column in *The Sunday Times* was also a source of fascination to many. Every second Wednesday evening, Paul would embark on frantic research to identify appropriate themes for his column. Questions would be raised, documents researched and, after hours of preparation, invariably a superb article would appear in the next edition of the paper.

Paul was not a party political figure. He believed passionately that the law should always serve the interests of ordinary people and that they should understand that the Bar and the Bench are not the masters of society but rather its servants.

When he was 42, Paul made the best decision in his life when he married Annick Hedderman. The years that followed were, I believe, the happiest years of Paul's life. He loved his wife and his children with an intense devotion. The frenetic work pace of earlier years was put to one side. He relished the precious time he spent with his wife and children who were the apple of his eye.

Paul became a senior counsel in 2015. His life appeared to have attained a stage of mellowness and serenity. However, in October 2019, suddenly he became seriously unwell. Within two months, Paul's life ebbed away under attack from an aggressive cancer. After the initial shock of discovering that he was afflicted with such a grave illness, Paul's response was entirely in keeping with his character. He bore his unexpected illness with extraordinary faith, fortitude and calm. We may not choose when we die, but we can choose how we meet death. Paul did so with immense courage and acceptance. His was a life well lived to the end.

Dormiunt in somno pacis.

SM

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

Volume 25 Number 1
February 2020

A directory of legislation, articles and acquisitions received in the Law Library from November 17, 2019, to January 17, 2020.
Judgment information supplied by Justis Publishing Ltd.
Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.

ADMINISTRATIVE LAW

Certificate of naturalisation – Certiorari – Eligibility – Appellant seeking an order setting aside the judgment and order of the High Court and an order of certiorari quashing the decision of the respondent – Whether the appellant's application for a certificate of naturalisation was ineligible – [2019] IECA 285 – 14/11/2019

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International protection – Irrationality – Country of origin information – Applicant seeking international protection – Whether the respondent's decision was irrational – [2019] IEHC 767 – 14/11/2019

B v The International Protection Appeals Tribunal

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Babatunda v The Minister for Justice and Equality

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C v The International Protection Appeals Tribunal

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H v The Minister for Justice and Equality

Subsidiary protection – Judicial review – Asylum seeker – Applicants seeking subsidiary protection – Whether by confining the right to apply for subsidiary protection to the circumstance in which the asylum seeker's entitlement to remain lawfully in the State pursuant to s. 9(2) of the Refugee Act 1996 has expired and a decision has been taken to propose the deportation of the applicant under s. 3(3) of the Immigration Act 1999, Regulation 4(1) of the 2006 Regulations in conjunction with s. 3 of the said Act of 1999, has the effect of imposing a precondition or disadvantage upon a subsidiary protection applicant which is *ultra vires* Council Directive 2004/83/EC of April 29, 2004, and is incompatible with general principles of European Union law – [2019] IESC 75 – 31/10/2019

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Asylum and immigration – Deportation order – Chinese national – Application for leave to seek judicial review – [2019] IEHC 826 – 26/11/2019

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Deportation order – Order of certiorari – Revocation – Applicant seeking certiorari of refusal to revoke deportation order – Whether the manner in which the respondent proceeded to refuse to revoke the deportation order made in respect of the applicant was unlawful and breached fundamental principles of fair procedures and due process – [2019] IEHC 811 – 19/11/2019

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Further investigation – Liquidator – Directions – Applicants seeking directions as to any further investigation and analysis required to be performed by the liquidator of the respondent in determining the circumstances of the support given to the respondent and of the withdrawal of said support leading to the company's winding up pursuant to s. 631 of the Companies Act 2014 – Whether the liquidator had acted unreasonably – [2019] IEHC 769 – 13/11/2019
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K.B. v The Minister for Health

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Bills initiated in Dáil Éireann during the period November 17, 2019, to January 17, 2020

[pmb]: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Appropriation bill 2019 – Bill 102/2019
Broadcasting (amendment) (protection of journalism) bill 2019 – Bill 106/2019 [pmb] – Deputy David Cullinane and Deputy Seán Crowe
Broadcasting (television licence fees recovery) bill 2019 – Bill 90/2019 [pmb] – Deputy Seán Sherlock
Criminal justice (money laundering and terrorist financing) (amendment) (Cross Border Crime Agency) bill 2019 – Bill 108/2019 [pmb] – Deputy Brendan Smith
Defence (amendment) bill 2020 – Bill 2/2020
Fiscal responsibility (amendment) bill 2019 – Bill 94/2019 [pmb] – Deputy Martin Heydon
Health insurance (amendment) bill 2019 – Bill 91/2019
Insurance (life assurance and life insurance) (amendment) bill 2019 – Bill 101/2019 [pmb] – Deputy James Browne
Litter pollution (amendment) (dog litter control) bill 2019 – Bill 95/2019 [pmb] – Deputy Seán Crowe and Deputy Kathleen Funchion
Migration of participating securities bill 2019 – Bill 93/2019
Misuse of drugs (amendment) bill 2019 – Bill 97/2019 [pmb] – Deputy John Curran
Official languages (amendment) bill 2019 – Bill 104/2019
Organisation of working time (domestic violence leave) bill 2019 – Bill 96/2019 [pmb] – Deputy Mary Lou McDonald and Deputy Maurice Quinlivan
Patient safety (notifiable patient safety incidents) bill 2019 – Bill 100/2019
Public health (electronic cigarettes and herbal cigarettes) bill 2019 – Bill 88/2019 [pmb] – Deputy Alan Farrell
Rent freeze (fair rent) bill 2019 – Bill 99/2019 [pmb] – Deputy Eoin Ó Broin and Deputy Mark Ward
Sexual offences (amendment) bill 2019 – Bill 103/2019 [pmb] – Deputy Donnchadh Ó Laoghaire and Deputy Martin Kenny
Social welfare (no. 2) bill 2019 – Bill 89/2019
Thirty-ninth amendment of the Constitution (right to health) bill 2019 – Bill 92/2019 [pmb] – Deputy Michael Harty
Trade union bill 2019 – Bill 107/2019 [pmb] – Deputy Mick Barry
Waste management (amendment) (regulator) bill 2019 – Bill 98/2019 [pmb] – Deputy David Cullinane, Deputy Jonathan O'Brien and Deputy Mark Ward

Bills initiated in Seanad Éireann during the period November 17, 2019, to January 17, 2020

Civil liability (schools) bill 2019 – Bill 105/2019 [pmb] – Senator Rónán Mullen, Senator Gerard P. Craughwell and Senator Victor Boyhan
Criminal justice (theft and fraud offences) (amendment) Bill 2020 – Bill 1/2020

Progress of Bill and Bills amended in Dáil Éireann during the period November 17, 2019, to January 17, 2020

Consumer insurance contracts bill 2017 – Bill 3/2017 – Report Stage – Passed by Dáil Éireann
Criminal records (exchange of information) bill 2019 – Bill 62/2019 – Committee Stage
Finance bill 2019 – Bill 82/2019 – Committee Stage – Report Stage – Passed by Dáil Éireann
Gaming and lotteries (amendment) bill 2019 – Bill 28/2019 – Report Stage – Passed by Dáil Éireann
Health insurance (amendment) bill 2019 – Bill 91/2019 – Committee Stage – Report Stage
Housing (regulation of approved housing bodies) bill 2019 – Bill 61/2019 – Committee Stage – Report Stage – Passed by Dáil Éireann
Landlord and tenant (ground rents) (amendment) bill 2017 – Bill 116/2017 – Committee Stage
Microbeads (prohibition) bill 2019 – Bill 41/2019 – Committee Stage
Prohibition of nuclear weapons bill 2019 – Bill 60/2019 – Report Stage – Passed by Dáil Éireann
Regulated professions (health and social care) (amendment) bill 2019 – Bill 13/2019 – Passed by Dáil Éireann
Social welfare (no. 2) bill 2019 – Bill 89/2019 – Committee Stage – Passed by Dáil Éireann

Progress of Bill and Bills amended in Seanad Éireann during the period November 17, 2019, to January 17, 2020

Civil law (costs in probate matters) bill 2017 – Bill 118/2017 – Committee Stage – Report Stage – Passed by Seanad Éireann
Consumer protection (gift vouchers) bill 2018 – Bill 142/2018 – Committee Stage
Criminal justice (rehabilitative periods) bill 2018 – Bill 141/2018 – Committee Stage
Criminal records (exchange of information) bill 2019 – Bill 62/2019 – Committee Stage
Education (student and parent charter) bill 2019 – Bill 67/2019 – Committee Stage – Report Stage – Passed by Seanad Éireann
Finance bill 2019 – Bill 82/2019 – Committee Stage – Report Stage
Gaming and lotteries (amendment) bill 2019 – Bill 28/2019 – Amendments made by the Dáil – Passed by Dáil Éireann
Housing (regulation of approved housing bodies) bill 2019 – Bill 61/2019 – Committee Stage
Judicial Appointments Commission bill 2017 – Bill 71/2017 – Report Stage
Microbeads (prohibition) bill 2019 – Bill 41/2019 – Committee Stage
Regulated professions (health and social care) (amendment) bill 2019 – Bill 13/2019 – Committee Stage
Social welfare (no. 2) bill 2019 – Bill 89/2019 – Committee Stage – Report Stage – Passed by Dáil Éireann

For up-to-date information please check the following websites:
Bills & Legislation
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Supreme Court Determinations – Leave to appeal granted

Published on Courts.ie – November 17, 2019, to January 17, 2020

Bookfinders Limited v The Revenue Commissioners [2019] IESCDET 268 – Leave to appeal from the Court of Appeal granted on the 14/11/2019 – (Clarke C.J., MacMenamin J., Charleton J.)
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Director Public Prosecutions v Doherty [2019] IESCDET 277 – Leave to appeal from the Court of Appeal granted on the 26/11/2019 – (Clarke C.J., Dunne J., Irvine J.)
Director of Public Prosecutions v McNamara [2019] IESCDET 257 – Leave to appeal from the Court of Appeal granted on the 19/11/2020 – (O'Donnell J., McKechnie J., Charleton J.)
Nolan v Sunday Newspapers Limited t/a as The Sunday World [2019] IESCDET 283 – Leave to appeal from the Court of Appeal granted on the 27/11/2019
Waterford Credit Union v J & E Davy [2019] IESCDET 278 – leave to appeal from the Court of Appeal granted on the 26/11/2019

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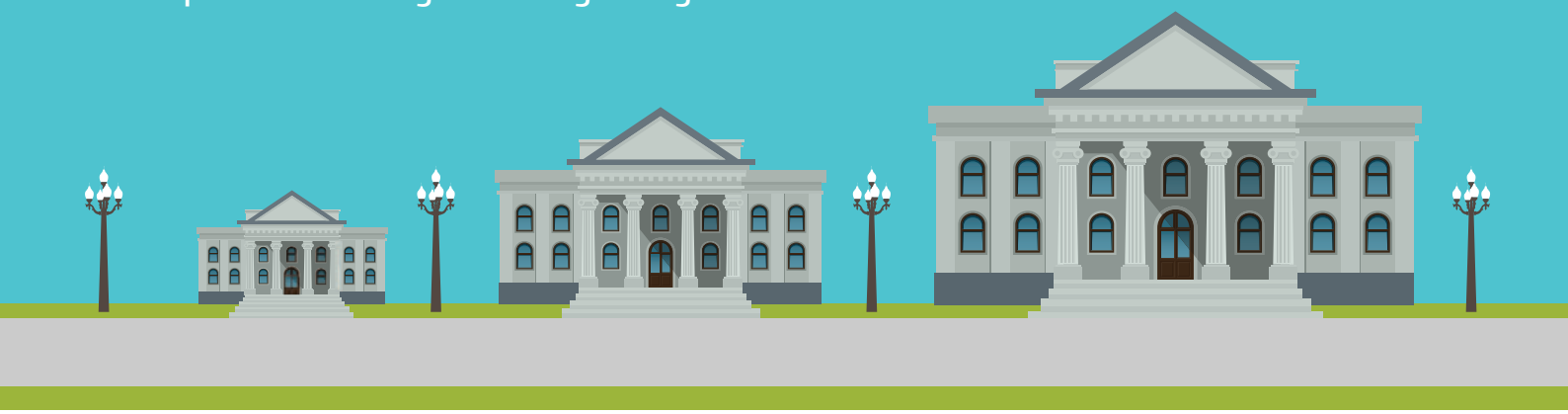
Supreme appeal

What are the criteria under which leave to appeal to the Supreme Court might be sought or granted?



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In the years since the introduction of its new appellate jurisdiction, the Supreme Court has stated in numerous determinations that it is no longer a court designed for the correction of error but rather one tasked with the determination of issues of general importance. Provisions inserted into Article 34 of the Constitution provide that the Court's appellate jurisdiction is exercised in limited circumstances and the general appellate jurisdiction previously exercised by it has been transferred to the Court of Appeal. Since 2014, the default position is therefore that appeals from the High Court, and certain decisions of other courts prescribed by law, are to be finally determined by the Court of Appeal, save in limited circumstances.

Any appeals to the Supreme Court should, ordinarily, come from the Court of Appeal, and it is expected that most cases will have undergone a filtering process, limiting the scope and nature of the issues to be determined. To secure leave to appeal to the Supreme Court, it must be established in all cases that the decision sought to be appealed against involves a matter of general public importance or that, in the interests of justice, it is otherwise necessary that there be such an appeal. Where a prospective appellant however seeks leave to appeal directly to the Supreme Court, the Court must also be satisfied that there are "exceptional circumstances" warranting a direct appeal. To understand what these requirements mean in practice, it is helpful to refer to the now well-known guiding principles discussed in: *Fox v Mahon* [2015] IESCDET 2; *Barlow v Minister for Agriculture, Food and the Marine* [2015] IESCDET 8; *B.S. v Director of Public Prosecutions* [2017] IESCDET 13; *Price Waterhouse Cooper (a firm) v Quinn Insurance Ltd (under administration)* [2017] IESC 73; and, in respect of applications for leave to appeal directly from the High Court, *Wansboro v Director of Public Prosecutions* [2017] IESCDET 115.

The Supreme Court's application of these principles is also illustrated in its many other determinations, which can be viewed online. The Court's inaugural annual report for the year 2018, published in April 2019, provides a further opportunity for analysis, including statistics indicating the rate at which the Court granted, or refused, leave to appeal, and indicating the nature of the proceedings concerned. The rate at which leave to appeal was granted in 2018 was just under 37%. Out of 157 applications for leave to appeal determined by the Court in 2018, 58 were granted.

The subject areas that gave rise to the largest number of applications for leave to appeal were criminal law, immigration law, and cases involving procedural issues. However, the highest number of determinations granting leave to appeal in 2018 arose in immigration law cases arising from judicial review proceedings (24% of the applications granted). The second highest rate applied in cases involving questions of statutory interpretation. The third highest was in European Union law cases. In respect of the latter category, the Chief Justice has recently remarked on the high percentage of cases heard by the Supreme Court that involve a significant EU law element, including in the context of European Arrest Warrants, and immigration and environmental issues.[1]

Any appeals to the Supreme Court should, ordinarily, come from the Court of Appeal, and it is expected that most cases will have undergone a filtering process, limiting the scope and nature of the issues to be determined.

The high number of determinations granting leave in immigration law cases may reflect, firstly, the large number of such cases brought in the State. These cases, however, routinely require consideration of complex provisions regulating administrative procedures, the implementation of European Union directives and regulations, and the application of developing European Union jurisprudence on significant matters such as citizenship rights. Furthermore, the introduction of significant legislation in the area in recent years has given rise to applications for leave to appeal to the Supreme Court. For example, in *S.G. (Albania) v Minister for Justice and Equality* [2019] IESCDET 13, the Court determined that leave should be granted to appeal directly from the High Court in light of the importance of the interpretative issues decided and having regard to the general application of the International Protection Act 2015, the implications of which went beyond the context of the particular case.

It is also to be recalled that the right of appeal in some planning, immigration and criminal law cases is circumscribed by a statutory requirement for the grant of a certificate for leave to appeal by the court of trial before any appeal can be brought. Where a certificate for leave to appeal has been refused, and an appeal to the Court of Appeal therefore precluded, this has been recognised by the Supreme Court as a matter that may give rise to "exceptional circumstances" for the purposes of leave to appeal directly to the Supreme Court. Some appeals within these categories of cases will therefore be brought directly from decisions of the High Court, subject to the satisfaction of the relevant constitutional requirements. In five of the 12 cases (42%) in which a direct appeal from the High Court was permitted by the Supreme Court in 2018, the High Court had refused to grant a certificate for an appeal. In *Grace and anor v An Bord Pleanála* [2016] IESCDET 28, relating to a planning permission, the Court remarked that "general public importance" is a lower standard than "point of law of exceptional public importance". The Court was satisfied that the impossibility of pursuing an appeal to the Court of Appeal, in a case where the Court is satisfied that the general constitutional threshold has been met, may in some cases provide the appropriate "exceptional circumstances".

However, it is important to note that the question of whether a case satisfies the criteria for the grant of leave to appeal depends primarily on the nature of the issues arising from the decision rather than the nature of the proceedings.

Issues of broad application

Where the issue arising from the decision is applicable across an area of law or to a manner of decision-making, this will weigh in favour of the grant of leave. The Court's judgment on an issue of statutory interpretation, for example, might affect a large number of pending and future cases. If the relevant issue or issues can be said to affect the administration of justice generally, this will weigh in favour of the grant of leave, and the general public importance of the issues will be apparent.

For example, the Court granted leave to appeal in *Kilty v Dunne* [2019] IESCDET 7, a case regarding the question of the scope of the immunity in respect of costs available to a District or Circuit Court judge in judicial review proceedings. Where a case includes some issues of clear general public importance, and others that are case specific, the Court may grant leave to pursue some grounds on appeal but refuse leave in respect of others. In *Ryan v Governor of Mountjoy Prison* [2019] IESCDET 15, a case concerning contempt in the face of the Court resulting in imprisonment, the Supreme Court granted leave to appeal in respect of grounds addressing fundamental questions as to the parameters of a Court's powers in determining an Article 40 inquiry but refused leave in respect of grounds considered to refer to case-specific issues, noting that the Court had already considered the general law in relation to contempt.

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Potential to influence true matters of principle

Where the court below has decided the matter by the application of established legal principles, which are not themselves the subject of challenge, it is unlikely that the Supreme Court will grant leave to appeal. In *Elektron Holdings Limited and anor v Kenmare Property Finance Limited and anor* [2019] IESCDET 43, the applicant sought to appeal a decision of the Court of Appeal in which a decision of the High Court to apply the rule in *Hendersen and Hendersen* against it was upheld. The Supreme Court refused leave, concluding that an assessment by the Court as to whether a point could and should have been raised before was an assessment on the merits and one of substance rather than form. The case therefore resolved into one that concerned the application of that overall, clear principle in the circumstances of the case.

In *B.S. v Director of Public Prosecutions* [2017] IESCDET 13, the Supreme Court determined that unless it can be said that the case has the potential to influence true matters of principle, rather than the application of those matters of principle to the specific facts of the case, the constitutional threshold will not be met. The application of general principles to the facts of a particular case was considered to be a matter of judgment, possibly a judgment on which reasonable people may differ. The Court reiterated its raison d'être, namely that its constitutional task involves determining matters of general importance. It did not, however, exclude the possibility that the way in which general principles may properly be applied in different types of circumstances could give rise to an issue meeting the constitutional threshold.

Clarifying the law

In cases where a proposed appeal has the potential to clarify an area of law, this will be a factor in favour of the grant of leave to appeal. In *Price Waterhouse Cooper (a firm) v Quinn Insurance Ltd (under administration)* [2017] IESC 73, the Supreme Court was satisfied that the question of the proper application of the principles relating to the ordering of further particulars was a matter of general public importance. While the principles set out in the relevant case law were well known, their application in the High Court and the Court of Appeal had led to diametrically opposed results. The available decisions suggested uncertainty as to the correct application of principles and the issue was considered by the Supreme Court to be one that affects all litigation.

Even if it might be argued that relevant settled legal principles exist, where the case concerns an issue of general importance and presents an opportunity for the Supreme Court to add to the available jurisprudence and clarify the law, this can

weigh in favour of the grant of leave. In *Wansboro v Director of Public Prosecutions* [2017] IESCDET 115, the Court granted leave, notwithstanding the existence of relevant settled legal principles, being satisfied, firstly, that the case involved a matter of general public importance. An important legal question arose, namely the precise circumstances in which orders made under legislation rendered invalid by a declaration of unconstitutionality can continue to have effect. The proper application of those principles in certain cases was debatable.

The Court might however consider that the determination of issues arising from the decision of the lower court is of less utility in the sense that a further decision by the Supreme Court is unlikely to add to the available jurisprudence. *Knockacummer Windfarm Limited v Cremins* [2019] IESCDET 21 concerned the interpretation of a contract, in which different judges in the High Court, albeit applying settled legal principles, had applied different interpretative tools in particular scenarios leading to different conclusions as to the interpretation of a term. The case was not found to give rise to any real question likely to transcend its particular features. The Supreme Court stated that while the application of very general principles to a particular type of case may involve a matter of general public importance that transcends the issues in the case in question, it remains the situation that the application of established principles to the circumstances of a particular case is unlikely to add to the jurisprudence and is therefore unlikely to give rise to an issue of general importance.

Some cases are less nuanced. In *Lanigan v Central Authority, Minister for Justice and Equality and others* [2019] IESCDET 2, the applicant sought to pursue an issue as to the constitutionality of legislation that had been scrutinised in earlier cases and its constitutionality confirmed. The applicant was found to have failed to present any cogent argument in support of its re-examination and leave to appeal was refused.

The Court might however consider that the determination of issues arising from the decision of the lower court is of less utility in the sense that a further decision by the Supreme Court is unlikely to add to the available jurisprudence.

Determinative issues

The effect of a proposed appeal, against the particular facts and background of the case, is also an important consideration. The case as a whole must be an appropriate vehicle for the Court's consideration of the point raised and the issues should have a practical relevance to the potential outcome of the appeal. The issues will inform the grounds in respect of which the Court will grant leave (see *Director of Public Prosecutions v O'R* [2016] IESC 64; [2016] 3 IR 322). The issues giving rise to the grant of leave to appeal must also arise from the court's judgment. The Court will not engage in a speculative analysis of issues not dealt with in the court below (*Attorney General v Lee* [2016] IESCDET 93). Parties are not necessarily precluded from obtaining leave where the case is moot. For example, in *M.G. (a minor) v the Director of Oberstown Children's Detention Centre and others* [2019] IESCDET 46, the Court was satisfied that the proceedings raised an issue of general public importance, namely the question of whether children serving custodial sentences were entitled to the same treatment in respect of remission as adults, notwithstanding that the detention order on foot of which the applicant had been detained was spent. It considered the appeal to raise issues of broad application and that the appeal provided an unusual opportunity to clarify the law. The question fell into a category of issues that would affect a significant number of individuals where such sentences are, in the case of children, generally of relatively short duration.

Interests of justice

A party that has had the opportunity to have the decision of the High Court reviewed by the Court of Appeal will have had the benefit of having been able to put its case both at trial and on appeal. The "interests of justice" will, in the ordinary course, be satisfied in such circumstances and, without more, a further review on appeal to the Supreme Court will not be required (*B.S. v DPP*).

O'Donnell J. in *Price Waterhouse Cooper (a firm) v Quinn Insurance Ltd (under administration)* [2017] IESC 73 described the interests of justice as a "residual" category under which leave may be granted and, as a criterion, "sufficiently flexible to respond to the demands of the individual case".

He illustrated the term by reference to a non-exhaustive series of examples, such as: where a point is raised in a cross appeal and it would be unjust to restrict the party seeking to advance it notwithstanding that it is not a matter of general public importance; where it is necessary to permit an appellant to argue a point since otherwise determination of the issue of general public importance may not resolve the case; and, where the point the applicant seeks to advance relates to something that occurred for the first time in the Court of Appeal, the interests of justice being served by permitting an appeal to the Supreme Court even though the matter was not itself a matter of general public importance.

Leapfrog appeals

In 2018, 50 of the 157 determinations published were in respect of leapfrog applications. The Court permitted a direct appeal in just 12 cases out of the 50 applications brought (24%). Out of three Constitutional law cases, the Court permitted a direct appeal in two cases. Nine of the 50 applications concerned immigration law issues arising in judicial review proceedings and the Court granted leave to appeal in five of those cases. A further five leapfrog applications (10%) arose in environmental or planning law cases arising in a judicial review context. Leave to leapfrog appeal was granted in one such case. Following an appeal to the Court of Appeal, it is reasonable to expect that the issues that might ultimately come before the Supreme Court on a further appeal will be narrower and more focused than in the event of a direct appeal. The fact that a case might involve a matter of general public importance, clearly a high threshold in itself, will not suffice for the grant of leave to appeal from the High Court directly to the Supreme Court. To do so would deprive Article 34.5.4, which restricts direct appeals from the High Court to cases where exceptional circumstances pertain, of its meaning. Such a direct appeal can be permitted only where the constitutional threshold is met and "exceptional circumstances" pertain justifying a direct appeal. In *Barlow v Minister for Agriculture, Food and Fisheries* [2015] IESCDET 8, the Supreme Court provided the following guidance in relation to exceptional circumstances:

"[…]In attempting to reach an assessment on that question the court may well have to analyse the extent to which, on the one hand, there may be perceived to be a disadvantage in not going through the default route of a first appeal to the Court

of Appeal and balance that against any disadvantage, whether in the context of putting the courts and the parties to unnecessary trouble and expense or in relation to a delay in achieving an ultimate resolution of urgent proceedings, which might be involved by running the risk of there being two appeals. In that later context it should be acknowledged that there will only truly be a saving of time and expense for both the courts and the parties, if it is likely that there will be a second appeal irrespective of the decision of the Court of Appeal".

The Court's determinations indicate that the further away the case is from a 'single issue case', the greater the potential for the impairment of the appellate process. Even if a case concerns only a small number of issues, these issues may be refined by the appeal process, rendering a second appeal, if one is justified, more likely to be able to focus on the key issues (*Fox v Mahon* [2015] IESCDET 2). If, however, a further appeal to the Supreme Court is likely following any determination of the matter by the Court of Appeal, and the appeal is likely to "look the same", while the Court has recognised that there will always be value in obtaining the views of the Court of Appeal, this is a factor that may weigh against the presumption in favour of an appeal to the Court of Appeal.

The factors to be considered in assessing the suitability of a case for a leapfrog appeal were given detailed consideration in *Wansboro v Director of Public Prosecutions and anor* [2017] IESCDET 115. A starting point is a consideration of the advantages of an intermediate appeal. Certain factors, while not decisive, pointed in favour of allowing a direct appeal, potentially counterbalancing the presumption in favour of an appeal to the Court of Appeal, including: costs (where the advantages of an intermediate appeal are minimal); speed; effect on other cases; and, the question of whether the issue of general public importance might fall away or continue to be live following an appeal to the Court of Appeal.

Overarching constitutional task

Parties considering the prospects of a potential application for leave to appeal to the Supreme Court are required to be mindful of the constitutional architecture now in place, particularly the Supreme Court's repeated statements that it is not a court for the correction of error. Most cases will be considered to be finally determined where the Court of Appeal has fulfilled its function.

The considerations that distinguish applications giving rise to leave from those that do not can appear nuanced, such as where the decision sought to be appealed involves apparently settled legal principles. Subtle differences in the facts of such cases have separated those cases in which leave was granted from those in which it has been refused.

References

1. 'Supreme Court 'the protector of rare birds', Chief Justice says', *The Irish Times*, October 9, 2019.

The trial of children in the Central Criminal Court

The trial of Boy A and Boy B for the murder of Ana Kriégel was unprecedented in this jurisdiction due to the age of the accused as well as the circumstances of the case.[1]

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In the 2019 trial of Boy A and Boy B for the murder of 14-year-old Ana Kriégel in May 2018, both accused were 13 years of age at the time and lived in the same area as the victim. All three knew each other. There appeared to be no answer to the question as to why Ana Kriégel was killed. Both boys were charged with her murder and Boy A was also charged with aggravated sexual assault.

Pre-trial considerations

One of the notable aspects of the trial was how swiftly it took place. The Courts Service Annual Report indicates that waiting times in the Central Criminal Court are, on average, 11 months and that "earlier dates are made available for trials involving child and other vulnerable witnesses".[2] This figure does not allow for time spent in the District Court for service of the Book of Evidence. In this jurisdiction, the issues regarding delay for hearings of accused children have been comprehensively examined in the case of *RD v DPP*.[3] Domestic[4] and international legislation[5] requires that there is no delay when it comes to matters involving the trial of children. Nonetheless, it is remarkable that the trial of Boy A and Boy B took place so promptly, considering the scale of the prosecution evidence.[6] In addition, and quite crucially, an experienced trial judge was assigned to the trial in advance and thus was able to deal with pre-trial matters[7] and to anticipate any issues that might arise, thus ensuring the smooth running of the trial.

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During the trial

On the first day of the trial, when the defendants were arraigned, a parent sat in the dock with each of them. From then on, both Boy A and Boy B sat in the body of the court separate to each other, and each accompanied by parents and family.[8] In accordance with the Children Act 2001, the courtroom became the Children's Court for the duration of the trial. The defendants were accompanied by their

parents at all times,[9] counsel and the judge did not wear robes,[10] the proceedings were held in camera,[11] and reporting restrictions[12] were in place, augmented by an order of the court making any violation not only punishable under the Children Act 2001, but also under contempt of court proceedings.

The court initially sat from 10.45am until 1.00pm, and from 2.00pm until 4.15pm, with a 15-minute break in the morning and afternoon to assist the participation of the accused. The trial timetable was later revised so that the court sat only in the morning to ensure the well-being of the defendants. The ability of accused children to comprehensively participate in criminal proceedings was one of the significant aspects of the European Court of Human Rights (ECtHR) judgment of *Venables and Thompson v UK*.[13] The ECtHR stated that while there had been no violation of Article 3,[14] the manner in which the trial was run and the difficulties that the accused faced[15] meant that they had not been able to fully participate in the trial process and, therefore, there had been a violation of their right to a fair trial under Art. 6 of the Convention.[16] The right to be heard and to participate is also embodied in s. 96 of the Children Act 2001.[17] The emphasis on participation and the minimisation of factors that might increase the anxiety for the accused was of paramount importance in the trial of Boy A and Boy B. While the trial was held in camera, the restriction in terms of persons able to enter the courtroom was rigorously observed each day. In addition, when both accused, who were on bail, left the courtroom for breaks and lunchtimes, they went to separate rooms close to the court, which had controlled access, allowing for greater privacy and preventing them from coming into contact with persons in any other court.[18] They were also afforded special access to the court building itself so that they did not have to use the public entrance. Apart from this, however, there was little to distinguish the trial from that of any other taking place in the Central Criminal Court before a jury, with all the usual rules of evidence.

Evidence and sentencing

As the evidence was placed before the jury, it became apparent that the gardaí had put considerable care into the manner of the investigation. The searches of the homes of Boy A and Boy B were carried out by gardaí who had arrived in plain clothes in unmarked rental cars rather than patrol cars. Any evidence gathered was taken from the defendants' houses in evidence bags that were then put into black plastic bags to disguise them. In accordance with the Children Act 2001,[19] a parent or guardian was present throughout the questioning. But in addition, and in line with s. 55 of the Children Act 2001,[20] other efforts were made by An Garda Síochána to take into account the youth of both accused. While Boy A was questioned in two different garda stations, the same member in charge was present so that there would be a familiarity with the personnel responsible for protecting his rights in custody. There were no other prisoners held in the garda stations during that time and, instead of staying in a cell, a room was cleared and camp beds installed to allow the defendant and his appropriate adult to stay in accommodation that was not a conventional garda station custody cell. The defendants were given early warnings to seek legal advice prior to the arrests. The arrests were carried out by arrangement with their respective legal advisors whereby the boys presented at the garda stations for that purpose. In addition, any breaks during questioning were taken in a separate room with no gardaí present. The detention times were in accordance with the usual legislation and extended as per appropriate applications. Medical practitioners were called when required to resolve any health concerns.

Throughout the trial, the evidence was presented in a form that allowed the jury to follow a significant amount of information in as clear a manner as possible. Geraldine Kriégel, Ana Kriégel's mother, gave evidence first, which allowed the personality of Ana Kriégel to be present throughout the trial. When witnesses gave their testimony, the relevant required proofs (such as proof of warrants and chains of evidence), were dealt with separately, allowing the jury to follow the evidence more logically. CCTV evidence showing the movements of Ana Kriégel and the boys on the day of her death was presented in a single video format, which consolidated the timelines from all of the CCTV that had been gathered from various locations, and which were simultaneously shown on maps. A 3D computer model video of the house where she had been murdered and ultimately found was also presented to the court, placing the crime in context in circumstances where the condition of the derelict house was such that a jury visit would have been unsafe.

The defendants were accompanied by their parents at all times, counsel and the judge did not wear robes, the proceedings were held in camera, and reporting restrictions were in place, augmented by an order of the court making any violation not only punishable under the Children Act 2001, but also under contempt of court proceedings.

Boy A and Boy B were permitted to be absent from the courtroom for the testimony of Prof. Marie Cassidy, who carried out the post mortem on Ana Kriégel. Instead, one parent stayed with each accused outside while the other parent stayed in the courtroom. There was no pressing requirement for the boys to hear the details of the injuries sustained by Ana Kriégel, but a parent was present to instruct counsel if necessary. If the accused were ultimately found not guilty, it would have been difficult, retrospectively, to justify them having to listen to this testimony. Ultimately, after hearing all the evidence and after deliberating for over 14 hours, on June 18, 2019, the jury found both accused guilty on all charges.

Sentences were handed down on November 5, 2019. Boy A was sentenced to life with a review after 12 years for the murder of Ana Kriégel. He was also concurrently sentenced to eight years in respect of the aggravated sexual assault. In addition, he was placed on the sex offenders register. Boy B was sentenced to 15 years for murder with a review after eight years. The trial judge also ordered probation and other reports to be prepared every two years for the benefit of the reviewing court, from when the teenage boys leave Oberstown detention centre at 18 years of age to continue their sentences in adult prison.

Significant issues arising from an unusual case

The criminal legal system, mercifully, has not often had to deal with the trial of a child committing murder in this jurisdiction. However, such cases require both legal counsel and the judiciary to wrestle with difficult issues in the absence of

specific legislative and procedural guidance. These include extraordinary media coverage, the impact of social media on the trial, and also sentencing issues following either a plea of guilty[21] or a guilty verdict.[22] In other cases, the accused may have transitioned from being a child (at the time of commission of the offence) to an adult before the trial,[23] thereby losing the advantages of the appropriate provisions of the Children Act 2001. The issues relating to the transitioning of a child to an adult while the case moves through the criminal justice system, and the inability of the system to facilitate the characteristics of such an accused, have been highlighted recently by Simons J. in the case of *DPP v TG*.[24] The impact of the transition has also been noted by the Supreme Court judgment of *BF v DPP*,[25] where Geoghegan J. stated:

"A trial of an adult in respect of an offence which he committed as a child, and particularly a sexual offence, takes on a wholly different character from a trial of a child who has committed such offences while a child".[26]

Lifelong anonymity orders were granted in the case of Boy A and Boy B when they were sentenced. This does not preclude the possibility of challenges to these orders at some future date, as has happened, as recently as March 2019, in the case of the boys convicted of the murder of James Bulger.[27] In respect of the most recent deliberate violation of the lifelong anonymity orders in that case, the English case of *Wixted*[28] indicates that these issues could arise in this jurisdiction in the future.

General sentencing provisions for children in this jurisdiction are contained in section 96 of the Children Act 2001.[29] However, the lack of precedent, as well as the gap in legislation, in respect of possible sentencing provisions for children tried in the Central Criminal Court, was highlighted in the legal argument preceding the sentencing. This focused on a review option, which is not available in the case of adult sentencing since the Supreme Court decision in *DPP v Finn*.[30] There is also a marked difference between 'detention' and 'custodial' sentences. A suspended sentence can only be given in relation to a custodial sentence. As children can only be 'detained' and not given a custodial sentence, any suspended sentence can only take place after the person convicted turns 18 and a review of the sentence has taken place.

A high level of ingenuity and flexibility was employed at the trial of Boy A and Boy B so that the accused could participate and be given a fair trial. What was also apparent was a dynamic and focused approach so that the running of the trial and the welfare of the boys was central.

Ominously, an attempted murder in Dún Laoghaire involving a 17-year-old accused (15 years of age at the time of the offence) also came before the Central Criminal Court in November 2019.[31] The accused was sentenced to 11 years, to be reviewed in five years, when the balance may be suspended in whole, or in part, as the court sees fit. The requirement for review long term may be of assistance in ensuring that a younger person will benefit more immediately from frequent supervision as they mature. The case is under appeal by the DPP at present and a prompt hearing is anticipated.

The Irish Penal Reform Trust has recently highlighted the gulf that exists between the provisions for a person who is under the age of 18 and those for a person who is sentenced as an 18 year old. The social benefits of dealing with 18 to 24 year olds in a different manner in the criminal justice system are clear.[32] In addition, the issues are not confined to age and can often involve mental health difficulties, as noted in the aftermath of the Dún Laoghaire sentence and the Ana Kriégel case.[33] An unusual provision, section 72 of the Children Act 2001, obliges District Court judges to participate in any relevant course of training or education that may be required by the President of the District Court before "transacting business" in the Children's Court. Section 17 of the Judicial Council Act 2019 obliges the Council to establish a Judicial Studies Committee facilitating the training and education of judges with regard to their functions.[34] It is hoped that greater transparency and organisation in respect of the training of judges will result. It is unfortunate that the equivalent of the *Equal Treatment Bench Book* for judges in England and Wales,[35] and the *Youth Court Bench Book*,[36] both of which are freely available online, are not as accessible in this jurisdiction as they could facilitate a consistency of approach across the jurisdiction. Perhaps this issue will be addressed in the sentencing guidelines, which are imminent.[37]

A dynamic and focused approach

A high level of ingenuity and flexibility was employed at the trial of Boy A and Boy B so that the accused could participate and be given a fair trial. What was also apparent was a dynamic and focused approach so that the running of the trial and the welfare of the boys was central. The first week of the trial was hampered by incorrect reporting on the part of certain media organisations, which could have led to the jury being prejudiced or to the identification of the accused and/or other parties entitled to anonymity. At the end of the first week, the trial judge revised a decision to place a moratorium on all reporting for the duration of the trial and instead ruled to exclude one outlet from reporting for the duration of the trial. The amount of time spent dealing with these issues, particularly in the first week, was considerable. Throughout the proceedings, the trial judge maintained a consistent vigilance to ensure that media coverage would not impact on the rights of the accused to a fair trial, or on their welfare. For instance, when an application was made to increase the number of journalists physically allowed to sit in the sentencing courtroom (provision had previously been made for the majority of journalists to view the proceedings via videolink from an adjoining courtroom with five journalists permitted to sit in the sentencing courtroom itself),[38] the Court refused the application on the basis that the welfare of the accused was his primary concern, a decision underpinned by international law as adopted in this jurisdiction.[39]

While clearly capable of dealing with novel issues that arise during trials such as this, the judiciary deserves greater assistance in terms of legislative clarity as regards sentencing, as well as reporting and social media issues, where children are concerned. It is not reasonable to expect courts to deal with issues on an ad hoc basis, without legislative assistance or procedural guidance. The fact that they do it consistently well is insufficient reason for the legislative shortfalls in the system to be overlooked.

References

1. The author thanks those who greatly assisted in the writing of this article, particularly Brendan Grehan SC and Patrick Gageby SC. All errors and omissions are the responsibility of the author.
2. Courts Service Annual Report 2018, at p.111.
3. *RD v DPP* [2018] IEHC 164.
4. S. 73, Children Act 2001.
5. Rule 20.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") states that: Each case shall from the outset be handled expeditiously, without any unnecessary delay. Article 40.2 (b)(iii) of the Convention on the Rights of the Child states the State parties shall ensure: (iii) "To have the matter determined without delay…".
6. It should also be noted that the trial of Darren Goodwin took place in July 2004, eight months after the murder of Darragh Conroy.
7. Legislative provisions for pre-trial hearings are currently at an early stage in this jurisdiction with the Criminal Procedure Bill 2015 still at a 'general scheme' stage. See: http://www.justice.ie/en/JELR/Pages/Criminal_Procedure_Bill.
8. S. 91, Children Act 2001, requires that a parent or guardian attend at all court proceedings unless there are reasonable circumstances to excuse their presence or it would not be in the interests of justice for them to be present.
9. S. 91, Children Act 2001: Attendance at court of parents or guardian.
10. See Practice Direction, DC04 Dublin Metropolitan Children Court.
11. S. 94, Children Act 2001: Persons entitled to be present at hearing.
12. S. 93, Children Act 2001: Restrictions on reports of proceedings in which children are concerned; and, s. 252, Children Act 2001: Anonymity of child in court proceedings.
13. T v UK (Application no. 24724/94); *V. v the United Kingdom* (application no. 24888/94), ECtHR, December 16, 1999.
14. Article 3, European Convention on Human Rights: Prohibition of torture.
15. While modifications were made to the trial process in the case *T and V v UK*, the defendants' trial was not heard in camera, the courtroom and public gallery were full every day, customary court dress was worn, and the defendants were separated from their family. In addition, large and hostile crowds met the van taking the defendants to court every day, which, their lawyers argued, increased the PTSD from which the defendants were already suffering, and which made it difficult for them to participate in the trial. See *T v UK* (application no. 24724/94); *V v UK* (application no. 24888/94), ECtHR, December 16, 1999, at paras. 61-63.
16. Article 6, European Convention on Human Rights: Right to a fair trial.
17. S. 96, Children Act 2001: Principles relating to exercise of criminal jurisdiction over children.
18. S. 71 (2), Children Act 2001.
19. Part 6, Children Act 2001: Treatment of child suspects in Garda Síochána stations.
20. S.55, Children Act 2001: Treatment of child suspects.
21. *DPP v Anne Marie Sacco and V.W.* [1998] 3 JIC 2302; *DPP v V.W.* 1999 WJSC-CCA 2216; [1998] 7 JIC 1303.
22. *DPP v DG (Darren Goodwin)* [2005] IECCA 75.
23. See *DPP v Daniel McDonnell* [2018] IECA 189. At the time he committed the murder of Melanie McNamara, Daniel McDonnell was 17 years of age and Melanie McNamara was 16 years of age. He was 19 at the time of his conviction in January 2014.
24. *DPP v TG* [2019] IEHC 303; 2018 79 JR at para. 2 at page 1.
25. *BF v DPP* [2001] 1 IR 656.
26. *BF v DPP* [2001] 1 IR 656 at 664 as per Geoghegan J.
27. *Jon Venables, Robert Thompson v News Group Papers Limited, Associated Newspapers Limited MGN Limited, Ralph Stephen Bulger, James Patrick Bulger* [2019] EWHC 494.
28. *Her Majesty's Solicitor General v Anthony John Wixted* [2019] EWHC 2186 (QB).
29. S.96, Children Act 2001: Principles relating to exercise of criminal jurisdiction over children.
30. *DPP v Finn* [2001] 2 IR 25.
31. *DPP v MS* (CCDP0046/2018), November 4, 2019.
32. At a conference held on November 27, 2019, organised by the Irish Penal Reform Trust and the Irish Criminal Bar Association, there was a consensus as regards the need to treat 18- to 24-year-old offenders as a distinct cohort in the criminal justice system. See https://www.iprt.ie/latest-news/round-up-developing-youth-justice-2019/.
33. 'Youth mental health services in spotlight after Kriégel, Dún Laoghaire cases'. *The Irish Times*, November 7, 2019. Available from: https://www.irishtimes.com/news/ireland/irish-news/youth-mental-health-services-in-spotlight-after-kri%C3%A9gel-d%C3%BAn-laoghaire-cases-1.4074845.
34. S.17., Judicial Council Act 2019 – Judicial Studies Committee (commenced December 16, 2019).
35. *Equal Treatment Bench Book*, Court and Tribunals Judiciary, Judicial College, England and Wales (ed. February 2018 with September 2019 revision). Available from: https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/.
36. *Youth Court Bench Book*, Judicial College, England and Wales (August 2017). Available from: https://www.judiciary.uk/publications/youth-court-bench-book-and-pronouncement-cards/.
37. See s. 91, Judicial Council Act 2019: Sentencing Guidelines (commenced December 16, 2019).
38. Order of the trial judge, July 22, 2019.
39. Article 6: Right to a fair trial; European Convention on Human Rights Act 2003.

Social media, privacy and evidence

The use of images or other information gleaned from a social media account to contradict a personal injury claim in the courts creates a number of issues around privacy and confidentiality, many of which have not yet been considered by the courts here.

Michael O'Doherty BL

Introduction

The current topicality of unmeritorious personal injuries claims, in which the accuracy of a claimant's description of their injuries is cast into doubt by the production of contradictory evidence from social media, raises several interesting questions in respect of the manner in which such evidence is introduced. In a typical scenario, a claimant, purporting to be the victim of some form of accident, attests to the impact of the injuries they sustained on their quality of life, usually to include reduced mobility, constant pain and/or an inability to pursue a previously favoured pastime. The claim fails, however, when their sworn testimony is contradicted by evidence adduced by the opposing party, often in the form of photographs that reveal them to be lifting heavy objects, performing strenuous dance routines, or taking part in athletic activities.

In some cases, such evidence will be widely available, as the photograph may have appeared in the press, or on an organisation's website, and can be located by the input of the claimant's name into an internet search engine. In an increasing number of cases, however, the material is obtained from social media, most commonly the claimant's own account. Such material may exist in one of three circumstances:

- it may be publicly available by being visible on the public part of the person's social media profile;
- if a photograph was taken by someone else,[1] or includes someone else, then that third party may well have uploaded it to their own social media account; or,
- it may be in the 'private' section of the person's social media account, and theoretically unavailable other than to their social media 'friends'.

The core issues

Three issues arise in respect of the adducing of such material:

1. Is evidence gleaned from the public section of a claimant's public social media account generally admissible, and can the opposing party simply produce the evidence to contradict sworn testimony of the claimant, without the requirement to notify them of their intention?
2. Does the fact that such material is concealed behind the user's privacy settings alter the answer to the previous question?
3. Can a claimant be ordered to discover material from the private section of their social media account on the basis that it may be relevant and necessary, even if the applicant has no evidence that such material exists?

Right to privacy for social media users

A preliminary issue, central to much of the discussion on this subject, is the right to privacy in this jurisdiction. While the right attracts Constitutional protection under Article 40.3.1, it is not an unqualified right.[2] This is especially true when privacy is claimed so as to conceal behaviour of an unlawful nature.[3] Most significant of all, perhaps, is that privacy as a legal right, and the 'privacy' settings of a social media account,[4] are two entirely different concepts and, as set out in the case law, they

should not be confused with each other. Alternatively, confidentiality may also be advanced as a bar to such material being adduced as evidence. It does not exist as a right in the manner of privilege, for example, but instead will be recognised by the court only where the interests of justice require it.[5] If we accept a broad definition of confidentiality to be that the person in possession of the information did not intend it to be broadcast publicly, such a claim is naturally problematic in respect of a publication on social media. Even if concealed behind privacy settings, it is nonetheless made available to possibly hundreds of Facebook 'friends', and so it is difficult to assert that it could be considered to possess the requisite degree of confidentiality.

The three questions posed above have rarely been considered by the courts in this jurisdiction. Anecdotal evidence, however, suggests that such material is routinely introduced by an opposing party in personal injures claims to contradict the testimony of a claimant, without any requirement to reveal the manner in which such evidence was obtained.

The courts' willingness to allow such evidence to be adduced is perhaps a reflection of a lack of challenge to it being made on behalf of the claimant. This may reflect either a failure to appreciate the issues at play, or a benign acceptance that the 'game is up'.

These issues have been the subject of some debate in other jurisdictions and are discussed below.

General admissibility of photographic evidence from publicly accessible social media profiles

The initial question of admissibility can be disposed of relatively swiftly. For such evidence to be admissible, it must firstly be relevant,[6] and there would seem little question but that material that potentially contradicts the extent of injuries suffered by a claimant would meet this test.

Section 45 of the Courts and Court Officers Act 1995 requires parties to personal injuries actions to disclose certain specified categories of information, including copies of expert reports and the names of witnesses, but does not require them to disclose evidence from social media. There would seem, therefore, to be no practical bar to a defendant who is in possession of such material simply confronting a claimant with it during cross-examination. Furthermore, there is no published report in this jurisdiction of a claimant either enquiring about how the material was obtained, or of raising an objection either as to its authenticity[7] or the right of the defendant to adduce it into evidence.

If the material was publicly available, no issue would seem to arise in respect of any right to privacy on behalf of the claimant. This is particularly true if they had placed the material on a publicly accessible part of their social media account, as any attempt by the plaintiff to assert a claim in privacy or breach of copyright, having already chosen to make the material potentially available to over two billion Facebook users, would appear doomed to failure.[8]

In a rare published decision on the subject, albeit very briefly, the High Court in *Gervin v MIBI*[9] rejected the complainant's submission that photographs on her Facebook page, which contradicted her testimony as to the extent of her injuries, had been obtained in breach of her privacy. The Court rejected this for the simple reason that she did not have a privacy restriction on her Facebook account at the relevant time.[10] It is unclear whether the Court would have held that her right to privacy would have been breached if such a privacy restriction had been in place.

"I should say that anyone who uses Facebook does so at his or her peril. There is no guarantee that any comments posted to be viewed by friends will only be seen by those friends. Furthermore, it is difficult to see how information can remain confidential if a Facebook user shares it with all his friends and yet no control is placed on the further dissemination of that information by those friends."

Admissibility of material concealed by a user's privacy settings

What of material, however, that is hidden behind the privacy 'wall' of the subject's Facebook account, ostensibly to be viewed by only a few hundred Facebook 'friends' and not otherwise available? This is where the issue becomes more complex. In these circumstances, the party seeking to rely on the material is faced with one of two choices. They may apply to the court for an order for discovery of material that they believe to be hidden behind the privacy settings. This issue is considered below.

Alternatively, such party may already have obtained the material either via a third party who was a 'friend' of the claimant, or by requesting that they be added as a 'friend' of the party whose material they are seeking and, subject to them being so added, the material then becoming available to them. Having now come into possession of this ostensibly 'private' material, is the defendant simply allowed to present it to rebut the claimant's testimony?

While these questions do not appear to have been ventilated in the courts in this jurisdiction, a recent decision of the Workplace Relations Commission (WRC) is of interest. In *A Sales Assistant v A Grocery Retailer*,[11] the adjudicating officer was required to consider comments that had been made by the complainant on a Facebook group, which was open only to fellow union members, and which were the subject of disciplinary action by the respondent. The complainant submitted that those comments, which were acquired by the respondent from a different member of the Facebook group, should have been considered private, but the Adjudicator held otherwise.[12] The Commission held that it was "naïve" of the group's members to think that anything posted to the group page could be private, because "as a group with 43 members posting to a Facebook page, there is no prospect that the information could be contained in the group". While the members may have aspired to privacy, in reality, the information was posted on the worldwide web.[13]

Of note also is the decision of the Northern Ireland High Court in *Martin and ors v Gabriele Giambrone P/A Giambrone and Law*.[14] The plaintiffs had obtained a Mareva injunction against the defendant solicitors, and sought to make use of comments made by the defendant on his Facebook page, which they considered to be relevant to the proceedings.[15] The defendant applied to have the evidence excluded on the basis that the comments were visible only to his Facebook 'friends'. In refusing the application, the Court gave little credence to the belief that such postings on social media could be considered confidential, and made a general statement about the dangers of posting material on social media that might be

detrimental to any arguments that person might seek to advance in court:

"I should say that anyone who uses Facebook does so at his or her peril. There is no guarantee that any comments posted to be viewed by friends will only be seen by those friends. Furthermore, it is difficult to see how information can remain confidential if a Facebook user shares it with all his friends and yet no control is placed on the further dissemination of that information by those friends".[16]

It should be noted that it is unclear how the plaintiffs came into possession of the comments in the first place, i.e., whether they were publicly available at some stage but subsequently hidden behind a privacy setting, or deleted altogether. As already stated, the courts in this jurisdiction seem not to generally enquire as to the provenance of such material, although they would presumably do so were its authenticity to be called into question by the claimant.

Would a 'friend request', however, designed purely to gain access to the private section of the claimant's social media account, render any evidence subsequently adduced as inadmissible? And does the answer to that question vary depending on whether the opposing party set up a fake account with the intention of being added as a 'friend' so as to gain access to the claimant's account? While it may be considered unethical for a legal practitioner to set up such an account, it is unclear as to whether the courts would refuse to admit evidence obtained in this manner.

Discoverability of such material

The discussion thus far is predicated on a party already being in possession of the material with which they seek to expose the questionable nature of the claimant's evidence. More complex again is a request to discover the private section of a party's social media profile, on the basis that there may be material of relevance concealed behind the privacy settings, and the degree to which the party seeking such discovery will be required to demonstrate that their request amounts to little more than the oft-criticised 'fishing expedition'.

In such cases, the application may take the form of a request for discovery from the party that created the material, or alternatively a request for non-party discovery from the social media platform that hosts it. The traditional test of whether such material is relevant and necessary will be engaged, and the plaintiff may attempt to resist discovery on the basis that such matter is private or confidential. As regards obtaining the material from the social media platform, i.e., a non-party, the test[17] is similar to that for inter-parties discovery, although it is likely that the applicant will be put on stricter proof as to the likelihood that the non-party is in possession of the requested material.

In the courts of the US and Canada, this has been the subject of several interesting, and sometimes contradictory, decisions. In *Murphy v Perger*[18] the Supreme Court of Ontario considered an application for discovery of photographs that were available only to Facebook friends of the plaintiff, who had brought proceedings for personal injuries arising out of a road traffic accident. The court held that, as the plaintiff had photographs on the publicly accessible portion of her profile that were relevant to proceedings, it was reasonable to infer that relevant photographs were also posted in the private part of her account.[19] The Court refused to accept the plaintiff's assertion of a right to privacy over the material. It held that the fact that the plaintiff had 366 Facebook 'friends', to whom the material was available without restriction, meant that she could not be held to have a reasonable expectation of privacy.[20]

In *Leduc v Roman*,[21] the only visible element on the public part of the claimant's publicly accessible page was their name and profile photograph. The Ontario Superior Court of Justice nonetheless allowed the defendant's discovery application, holding that the public and private section of a Facebook profile should be treated in the same manner, and that a party is required to discover any material that is relevant to the proceedings: "To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial".[22]

A different decision, however, was arrived at by the Ontario Superior Court in *Stewart v Kempster*.[23] The plaintiff had 139 Facebook friends, but the court took the view that the exclusion of approximately a billion Facebook users from viewing her photographs was evidence that "she has a real privacy interest in the content of her Facebook account".[24] The Court concluded by drawing an analogy between the discovery sought of electronic material, and its pre-internet age equivalent of people communicating by letter: "It is unimaginable that a defendant would have demanded that a plaintiff disclose copies of all personal letters written since the accident, in the hope that there might be some information contained therein relevant to the plaintiff's claim for non-pecuniary damages. The shocking intrusiveness of such a request is obvious".[25]

Alternative remedies

Where the courts have held that no right to privacy was engaged in respect of material on a person's Facebook profile, the usual decision has been to order the plaintiff to discover any material that is relevant to their claim of having sustained the injuries complained of.[26] In some cases, however, courts have gone even further by ordering that the defendant be provided with the log-in details required to access the plaintiff's Facebook account, so that they can search for any relevant material themselves.[27] In one instance,[28] the trial judge, frustrated at the slow pace at which inter-party discovery was taking place, suggested that he himself create a Facebook account, request that the plaintiffs add him as friend "for the sole purpose of reviewing photographs and related comments in camera, he will promptly review and disseminate any relevant information to the parties. The Magistrate Judge will then close this Facebook account".[29]

The US courts have likewise held that it is acceptable for law enforcement authorities to gain access to the private section of a party's Facebook page by obtaining the material from a Facebook 'friend' of the subject, who was willing to co-operate with the authorities by providing them with the material.[30] The United States District Court held that "[the plaintiff's] legitimate expectation of privacy ended when he disseminated posts to his 'friends' because those 'friends' were free to use the information however they wanted – including sharing it with the Government".

Conclusion

Given the fact that privacy is a constitutionally protected right in this jurisdiction, it is perhaps surprising that the above issues remain unventilated here. It may well be that a superior court will pass judgment and find that the interests of justice clearly dictate that such material, when it appears to contradict sworn testimony, cannot be protected by any claims to privacy. The attitude of the WRC in *A Sales Assistant v A Grocery Retailer*, and the common attitude of the courts in other jurisdictions,

seems to be that a claimant gives up the right to assert any privacy over material that is voluntarily placed on their social media account. And in those circumstances, the manner in which the opposing party may have obtained such material is of no great concern to the court. But the question of whether discovery of the private section of a claimant's Facebook account would be permitted remains an unanswered one, as would the court's attitude towards material that has been obtained by the opposing party in a manner that may be less than ethical. It is surely only a matter of time before these issues will be determined by an Irish court.

Michael O'Doherty BL is the author of the forthcoming book *Internet Law*, to be published by Bloomsbury Professional in spring 2020.

References

1. This occurred in the recent US case of *Vasquez-Santos v Mathew*, 2019 NY Slip Op 00541 [168 AD3d 587], in which the claimant in a personal injuries case had been tagged in a photograph taken by a Facebook friend and uploaded to the latter's publicly accessible Facebook page.
2. As per Hamilton P in *Kennedy and ors v Ireland and anor* [1987] 1 IR 587.
3. In *EMI v UPC Communications*, Charleton J. stated that the right to privacy is lost when unlawful activity is sought to be concealed: "I find it impossible to recognise as a matter of constitutional law, that the protection of the entitlement to be left in the sphere of private communications could ever extend to conversations, emails, letters, phone calls or any other communication designed to further a criminal enterprise".
4. Facebook users have a choice as to whom they make the content that they upload available. Their content can be visible to all users of Facebook – approximately 2.2 billion people worldwide – or its visibility can be limited to a number of Facebook 'friends' chosen by the account holder.
5. See *Traynor v Delahunt* [2009] 1 IR 605, at 615. In *Independent Newspapers v Murphy* [2006] 3 IR 566, at 572, Clarke J. held that: "It is clear that confidential information which is not privileged must be revealed if not to reveal same would produce a risk of an unfair result of proceedings. The requirements of the interests of justice would, in those circumstances, undoubtedly outweigh any duty of confidence".
6. See *People (DPP) v Ferris* (unreported, Court of Criminal Appeal, June 10, 2002) at page 6.
7. The manner in which the authenticity of material from a conversation on Facebook could be established, when such material was being used as evidence in criminal proceedings, was recently considered by the Court of Appeal in *DPP v Moran* [2018] IECA 176.
8. This issue was considered, albeit briefly, by the English Employment Tribunal in *Crisp v Apple Retail (UK) Ltd* ET/1500 258/11. See discussion at para 3.110.
9. *Gervin v Motor Insurers Bureau of Ireland* [2017] IEHC 286.
10. *Gervin v Motor Insurers Bureau of Ireland* [2017] IEHC 286, at para 52.
11. *A Sales Assistant v A Grocery Retailer* (ADJ-00011898), decision of August 2, 2018.
12. In a finding that echoes that in *Martin and ors v Gabriele Giambrone P/A Giambrone and Law* [2013] NIQB 48.
13. See also the similar findings of the English Employment Tribunal in *Preece v JD Wetherspoons Plc* (ET/2104806/10) and *Teggart v TeleTech UK Ltd* NIIT/704/11, discussed at paras 10.74 and 10.129, respectively.
14. *Martin and ors v Gabriele Giambrone P/A Giambrone and Law* [2013] NIQB 48.
15. The relevant comment was: "They thought they knocked me down, now they will see the full scale of my reaction. F*** them, just f*** them. They will be left with nothing". *Martin and ors v Gabriele Giambrone P/A Giambrone and Law* [2013] NIQB 48, at para 1.
16. *Martin and ors v Gabriele Giambrone P/A Giambrone and Law* [2013] NIQB 48, at para 4.
17. See *Keating v RTÉ* [2013] IESC 22 (unreported, Supreme Court, May 9, 2013).
18. *Murphy v Perger* [2007] O.J. No. 5511 (Ont. SCJ).
19. A similar inference was drawn by the Supreme Court of Ontario in *Frangione v Vandongen* (2010) ONSC 2823.
20. The court arrived at a similar conclusion in *Frangione*, in which the plaintiff had fewer than 200 Facebook 'friends', describing the attempt to assert a right to privacy as 'preposterous', at para 38.
21. *Leduc v Roman* (2009) CanLII 6838 (ON SC).
22. *Leduc v Roman* (2009) CanLII 6838 (ON SC), at para 35.
23. *Stewart v Kempster* (2012) ONSC 7236.
24. *Stewart v Kempster* (2012) ONSC 7236, at para 24.
25. *Stewart v Kempster* (2012) ONSC 7236, at para 29. This analogy was rejected in the US case of In *Largent v Reed* No. 2009-1823 (District of Pennsylvania-Frankly County Branch), in which the Court stated that: "Photographs posted on Facebook are not private, and Facebook postings are not the same as personal mail".
26. See *Leduc v Roman* (2009) CanLII 6838 (ON SC), in which the court ordered that the claimant "preserve and print-out the posted material, swear a supplementary affidavit of documents identifying any relevant Facebook documents and, where few or no documents are disclosed, permit the opposite party to cross-examine on the affidavit of documents in order to ascertain what content is posted on the site".
27. See *Romano v Steelcase Inc. and Educational & Institutional Cooperative Services Inc.*, 907 N.Y.S. 2d 650 (September 21, 2010), and *Largent v Reed* No. 2009-1823 (District of Pennsylvania-Frankly County Branch).
28. *Barnes v CUS Nashville LLC* No.3:09-cv-00764 (M.D. Tenn) (June 3, 2010).
29. It is unclear from proceedings whether this offer was actioned.
30. See *US v Merigildo* 883 F. Supp. 2d 523 (S.D.N.Y. 2012) Aug 10, 2012.

Fighting for fair pay

It is past time that the Government restored the fee levels of barristers who carry out work on behalf of the State.

Seamus Clarke SC
Chairman, Criminal State Bar Committee

In April 2019, the Government and the Irish Medical Organisation (IMO) announced details of a negotiated agreement to invest in general practice and embark on a phased restoration of professional fees paid to GPs under the General Medical Card Scheme, which had been cut during the height of the financial crisis. Several months on from this Government decision, no commitment has been given to reverse the cuts that were applied to barristers. Why is this?

For the past four years, since March 2016, representatives of the Council have actively participated in making submissions, attending meetings, exchanging correspondence and participating in consultation processes to address professional fee levels paid to barristers for the services they provide. This occurred against the backdrop of fee cuts ranging in the order of 28.5%-69% that were applied amidst the financial crisis.

The primary agencies of the State who engage the services of barristers include the Director of Public Prosecutions, the Department of Justice and Equality, Criminal Legal Aid (for accused persons), the Legal Aid Board (civil legal aid), and the office of the Attorney General.

While the cuts applied under the Financial Emergency Measures in the Public Interest (FEMPI) Act did not strictly apply to barristers, each agency imposed cuts to the professional fees paid to barristers that amounted to the equivalent of FEMPI, and beyond.

Strong case

The outcome of discussions with each of the State agencies concerned has indicated that a strong case has been made by the Council to justify the reversal of cuts imposed during the financial crisis. In the case of the Office of the Director of Public Prosecutions, all parties are in unequivocal agreement that the ongoing flexibility being delivered by barristers is considered comparable to the flexibility delivered by other groups to justify the reversing of cuts imposed during the financial emergency.

However, each State agency is dependent on the provision of an increase in their annual budget allocation and accompanying sanction by the Department of Public Expenditure and Reform (DPER) to unwind the cuts to the professional fees of barristers they engage.

Restoration of pay is already well underway for both civil and public servants, State solicitors (who are independent contractors and have already had a restoration of 5.5% applied in respect of payments to them), and the judiciary.

During a meeting between representatives of The Bar of Ireland and officials from the DPER in November 2017, officials clearly and unequivocally advised that the professional fees of barristers could not be dealt with in isolation from the FEMPI process and other groups of contractors who were also seeking restoration of their fees.

It is therefore incomprehensible to representatives of the Council of The Bar of Ireland why, despite an agreement having been reached with general medical practitioners in April 2019, that an equivalent process of pay restoration has not commenced in respect of barristers' professional fees.

Restoration of pay is already well underway for both civil and public servants, State solicitors (who are independent contractors and have already had a restoration of 5.5% applied in respect of payments to them), and the judiciary. This is only right.

The Council takes no issue with restoration of pay for other groups, all of whose cases have been adjudged to warrant the restoration of FEMPI deductions. What is unfair, however, is the complete lack of consistency in the application of the Government's policy in relation to pay, and the arbitrary exclusion of barristers from the reversal of cuts process.

A comprehensive case has been made for the restoration of cuts that were applied to the professional fees of counsel. It is acknowledged that any new Government will continue to face immense challenges in terms of managing the nation's finances and deciding on the allocation of scarce public funds.

However, it is surely not an unreasonable expectation of barristers that they would be treated fairly and reasonably on matters relating to their remuneration.

It is hoped that the next Government will adopt a fair and reasonable approach towards the case for restoration of professional fees for barristers and, in doing so, acknowledge the important professional services that are provided by our profession in safeguarding justice.

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