THE BAR
REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

Volume 25 Number 4
July 2020

Freedom to travel

COMING SOON

Woods and Andrews on Liquor Licensing Laws

By Nicola-Jane Andrews

Woods and Andrews on Liquor Licensing Laws offers comprehensive analysis, with a strong focus on practical matters and advice for professionals making applications before the Circuit and District Court along with Revenue licensing applications. This title is invaluable to legal practitioners, as well as Gardaí, local authorities and those working in the hospitality sector.

This practitioner-friendly title lays out each topic in an easily accessible manner, and includes application practice and procedure requirements, a "proofs" checklist section to assist practitioners when bringing applications before the Court, and an extensive precedents section.

This Fifth Edition has been updated to reflect the many legislative developments in this area, including:

- Changes in trading hours
- The abolition of rateable valuation requirements
- Changes in hotel registration criteria
- The creation of producer's retail licence for distilleries and breweries with visitor centres
- The Public Health (Alcohol) Act 2018 and its provisions for labelling, pricing, advertising and restriction of sales.

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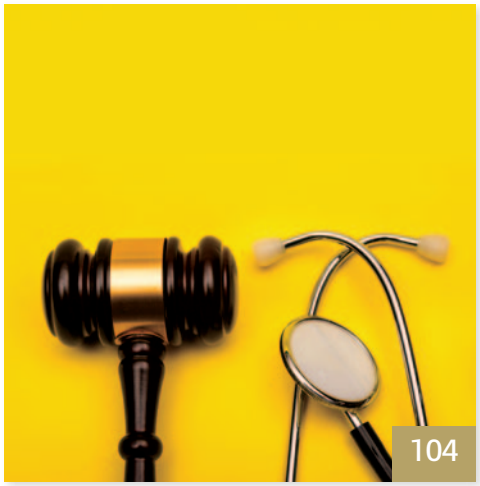

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With change comes new opportunities

A new phase, a new Government, a new Council.

Congratulations to all members who participated in the recent elections to the Council of The Bar of Ireland. I would also like to thank those members who have served on the Council with me and who complete their term of office this year. The Law Library has been well served over many years by the commitment of each individual Council member to represent the interests of the profession, particularly during the current Covid-19 crisis.

Reopening of the courts

We are now in Phase 3 of the Government Roadmap, and as other facets of our economy have begun to safely unwind restrictions, so too must our courts. The speed at which the reopening of the courts is occurring is a source of frustration for many. Litigants can't get their cases on, the case backlog is growing, and many barristers have seen their income stream decimated.

However, public health and members' safety must remain the priority. Every one of us supports the Courts Service in its efforts to minimise the risk of an outbreak occurring in our courts. We are all aware of the challenges in the early part of the pandemic, which led the Courts Service to all but close down the business of the courts. It will come as no great surprise that there are even greater challenges now in managing a re-opening. The Courts Service is obliged to carry out risk assessments in keeping with the Government's Return to Work Protocol, and to implement physical adjustments to court venues where necessary.

We continue to work closely with the Courts Service through the Consultative User Group offering practical solutions such as staggered and scheduled hearings, virtual callovers and the use of alternative venues. Such measures are already being adopted across various jurisdictions and we are beginning to see an increase in the throughput of cases. The Council is grateful to the judiciary and the Courts Service for the positive response to its request to facilitate September sittings this year in the exceptional circumstances of the pandemic. It is strongly in the public interest that the courts resume hearings to the greatest extent possible.

Member survey

A sincere thanks to the 583 members who completed our recent survey, which will greatly assist the Council in getting a further sense of how Covid-19 has impacted on the profession. A synopsis of the results are shared in this edition. Financial and economic viability was identified by 70% of all respondents as their primary concern; however, the results also point to the resilience and adaptability of practitioners.

New Programme for Government

A new Programme for Government was ratified on June 27. It contains justice sector reforms for which the Bar has advocated for many years, some of which are summarised in this edition's Closing Argument. We extend many congratulations to newly appointed Minister for Justice Helen McEntee TD, and newly appointed Attorney General Paul Gallagher SC, with whom we look forward to engaging on the many issues and challenges that lie ahead.

Movement on Hammond Lane

Among the commitments outlined in the new Programme for Government is the enactment of a Family Court Bill to create a new dedicated Family Court within the existing court structure, along with an increase in the funding allocated by the Department of Justice to the long-awaited development of a Family Law and Children's Court at Hammond Lane. This is a significant development and is a most welcome result for our Courting Disaster campaign.

Patents of Precedence

Applications are now open for solicitors and barristers to apply to the Advisory Committee on the grant of Patents of Precedence to use the title of Senior Counsel. The application form and guidance for applicants can be found on the LSRA website. The closing date for applications is 5.00pm on July 24, 2020. We understand that the Advisory Committee intends to provide its recommendations to Government before the end of July, which will enable the Call in the Supreme Court to take place at the usual time in October.

Practice Support and Fee Recovery Service

The new in-house Practice Support and Fee Recovery service is now live. I would urge all members to visit the new Practice Support and Fee Recovery hub on our website to familiarise themselves with the range of best practice information and tips on offer. The service will be based in the Distillery Building; however, due to social distancing restrictions, the service is currently being provided online.

Closing remarks

As I near the end of my Chairmanship, I feel a great sense of honour to have led, and to have witnessed first-hand, the deep commitment that Council and Committee members have shown to advancing the interests of the Bar. I could not have fulfilled my role as Chair without their work and commitment, and indeed the Bar would function poorly if it was unable to call on their volunteerism and dedication. Please take the time to read the Annual Report of The Bar of Ireland, which will be considered at the forthcoming AGM on July 20, 2020. It provides a deeper insight into the work the Council has been doing on your behalf.

I know you will join me in wishing the new Chair, Maura McNally SC, and Council every success over the next two years

Best wishes for a restful, if shorter, vacation.

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

Making justice a priority

It has been an extraordinary legal year with court business disrupted to an unprecedented extent.

As we all fervently look forward to a full resumption of court sittings, we are also hopeful that the new Government will make a priority of improving access to justice and upgrading court infrastructure. In our closing argument, we analyse the new Programme for Government and the prospects for much-needed reform to streamline the administration of justice.

The disruption caused by the Covid crisis has caused major difficulties for many businesses in performing their contractual obligations. In this context, *force majeure* clauses will frequently be invoked as a reason for failure to comply with those obligations. The extent to which these clauses will provide relief for some businesses will depend to a large extent on their wording and interpretation. Our writer sets out the key principles that must be considered when considering whether *force majeure* applies, as well as the steps that must be taken when invoking such a clause.

The pandemic has also necessitated the adoption of restrictions on the free movement of citizens, both internally and externally. While some of these restrictions have been lifted, many may be re-imposed if there is a significant increase in infection rates. We examine the legal basis for the adoption of such measures under European Union law and the requirement that such measures must be proportionate.

In *Morrissey v HSE* and others, the Supreme Court has moved to allay concerns that there is a new and unrealistic standard of care for professionals, particularly in relation to medical negligence. The Court has also grasped the opportunity to restate and clarify the relevant test. We analyse the highlights of the judgment and the matters that remain unresolved in relation to the entitlement to recover damages after the death of a person and whether there is a residual claim if that person has sued during their lifetime.

Elsewhere, in our interview, Sinéad McSweeney sets out the challenges of running the Irish operations of Twitter. As well as the wider issues of privacy and accountability that face all such interactive platforms, she discusses the increasing number of discovery requests and the regular deployment of social media in court.

Happy vacation to all.

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

Consultation on 2020 Rule of Law Report

On June 5, The Bar of Ireland participated in a virtual consultation with the European Commission's Directorate-General on Justice, alongside representatives from the Law Society and the Legal Services Regulatory Authority. The purpose of the consultation was to provide input to the Commission's first annual report on the Rule of Law – one of the major initiatives of the Commission's Work Programme for 2020, which will see a deepening of its monitoring of member states' compliance with the rule of law through a 'rule of law review cycle'. The cycle will cover all member states and culminate in the adoption of an annual rule of law report that will summarise the situation in member states as regards the rule of law. The first of these reports will be presented in September 2020.

The Commission invited submissions from The Bar of Ireland, and other key stakeholders in Ireland, in respect of four distinct areas: (i) legal fees; (ii) legal aid; (iii) the challenges faced by the Irish justice system as regards length of proceedings and judicial independence; and, (iv) the newly established Personal Injuries Guidelines Committee under the Judicial Council Act 2019. Access the written submissions to the Commission **here**.

FRA appoints Vice Chair

Sunniva McDonagh SC.

Congratulations to Sunniva McDonagh SC, Ireland's nominee to the Management Board of the EU Fundamental Rights Agency (FRA) and a member of The Bar of Ireland's Human Rights Committee, who has been appointed Vice Chair of the Management Board.

The EU FRA, based in Vienna, is the independent centre for the promotion and protection of fundamental rights in the EU. An important part of its work is through the collection and publication of research on fundamental rights.

In this regard it aims to provide robust evidence and expertise to guide policymakers at national and EU level. Key areas of focus include discrimination, access to justice, racism and xenophobia, data protection, victims' rights and children's rights.

A beacon for the highest standards

Micheál P. O'Higgins, Chairman of The Council of The Bar of Ireland, recently paid tribute to the outgoing President of the High Court, Mr Justice Peter Kelly. Due to Covid-19 restrictions, the tribute was a virtual one. We have reproduced the tribute in full, in recognition of the contribution that Mr Justice Kelly has made to the Bar, the judiciary and the legal profession:

"Peter Kelly is an advertisement for the Irish Bar and Bench. He was an outstanding barrister and leader of the Bar until his elevation to the High Court in 1996. As a High Court judge, judge of the Court of Appeal and, since December 2015, President of the High Court, he has been a beacon for the highest standards of competence, rigour, propriety and independence.

As a barrister, he commanded an extensive practice, first as a busy junior and then as senior counsel following his admission to the Inner Bar in 1986. On a given day, he could deliver the closing address to the jury in a high-profile defamation case and, on the next, in another court, present a pitch-perfect opening in a complex commercial action to a judge of the Chancery Court. The owner of a sonorous and commanding voice, he was much sought after as an advocate and was briefed in many of the big cases of the day. His elevation to the High Court in 1996 was celebrated by judges and colleagues alike, the latter for perhaps not exclusively altruistic reasons.

His formidable intellect and work ethic quickly earned him a reputation as a judge before whom a case had to be fully prepared and properly presented. In Judge Kelly's Court, the highest professional standards were encouraged and expected.

Appointed to the Bench at the relatively young age of 46, he is now the second-longest serving judge in the Irish Courts with 24 years' service. He presided over several difficult lists in the High Court such as chancery, judicial review, the Commercial Court and, as President, the professional regulatory lists and the Wards of Court. He was the leading figure in the establishment of the Commercial Court in 2004, a lasting and international legacy. His work in the wardship list, where justice, humanity and the law co-exist to vindicate the rights of the elderly and the vulnerable, gave him particular fulfilment. This may say something about him.

Regarded as an accomplished legal writer, his many written judgments stand as jewels of logic and learning, and have contributed to the development of the law in many areas. Equally impressive is his ability to frame a clear, fluent and reasoned *ex tempore* judgement, within minutes of a case concluding, often with Newman-like balancing clauses.

His independence and fearlessness as a judge stand as an example to his colleagues. A believer in the separation of powers, he clashed with the Government over the treatment of vulnerable adolescents detained in the care of the State, when dealing with the Minors list in his first few years on the Bench. The same independence of mind was evident when, as President of the Association of Judges, he had to defend the judiciary at a point in time when relations with Government were less than warm.

For a short period, he held the dual role of President of the High Court and acting President of the Court of Appeal when its President was rendered temporarily unavailable due to illness. This earned him the affectionate title "Kelly PP".

Outside of the law, Peter Kelly has many friends and interests: music, theatre, literature, history, opera and a love of all things Italian. He sits on the board of a hospital and a schools trust and helped found two hospices. His voluntary work is pursued quietly and below the radar. Having made an enormous contribution to our courts and legal order, he will now have a little more time to pursue these interests. We feel he has earned it.

On behalf of the Council of The Bar of Ireland, we wish him well in his retirement.

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

Ms Justice Mary Irvine appointed new President of the High Court

The Bar of Ireland welcomes and congratulates Ms Justice Mary Irvine on her appointment as President of the High Court, the first woman to serve in this role. Ms Justice Irvine brings with her a wealth of knowledge and expertise cultivated through a distinguished legal career, both as counsel and on the bench.

Called to the Bar in 1978 and to the Inner Bar in 1996, Ms Justice Irvine specialised in medical law. As a judge of the High Court (2007), the Court of Appeal (2014), the Supreme Court (2019) and now High Court President, she is the first judge to have held four judicial offices in the history of the State. Ms Justice Irvine was responsible for the personal injuries list from 2009 to 2014, and oversaw the management and determination of all Garda compensation claims. She chaired the Working Group on Medical Negligence and Periodic Payments established by the President of the High Court in 2010 and was appointed Chair of the CervicalCheck Tribunal established by the Government in 2018. She currently chairs the Personal Injuries Guidelines Committee of the Judicial Council.

New Council Chair elected

Maura McNally SC has been elected as Chair of the Council of The Bar of Ireland, the representative body's second-ever female head. A Leitrim native, Maura was called to the Bar in 1992, and practised on Circuit until her appointment to the Inner Bar in 2017. Following postgraduate studies in Warwick University (LLM) and UCG (BA and LLB), she completed her Barrister-at-Law in King's Inns and practises civil law, primarily in personal injury, chancery and non-jury.

Maura says: "I'm honoured to have been elected as Chair by my Council colleagues. There are significant challenges on the horizon for the profession and the wider justice field, not least the fallout from Covid-19, as well as Brexit. I'm looking forward, with the energy and support of the new Council, to making an important contribution in relation to the administration of justice and our role within it. Strengthening our relationships with external partners, here in Ireland, and in the UK and Europe, will be an important part of finding solutions, identifying opportunities and ensuring a sustainable Bar".

Maura follows in the footsteps of the late Ms Justice Mella Carroll, who was the first woman elected Chair 41 years ago. Maura notes: "After over four decades, to be following in the footsteps of the last female Chair, Ms Justice Mella Carroll, is personally significant for me. A representative Bar benefits those whom we serve, those who practise and those who are interested in a career at the Bar. To be elected at this time, and having actively pursued the issues of resilience, mental health and diversity while on the Council, I hope to add further to the reputation of the Bar as a true community of professionals, committed to the pursuit of justice, independence and fairness".

Maura will Chair the Council from August 1, 2020, to July 31, 2021, and takes the helm of the Bar following the Chairmanship of Micheál P. O'Higgins SC.

Practice Support and Fee Recovery: a new service for all members

A long-standing challenge encountered by many members of the Law Library is recovering outstanding fees in a timely manner, or at all. In addition, a regular issue raised by members is the need for greater guidance and support in matters of financial and practice management.

Seán Ó hUallacháin SC

Over the years the Council has endeavoured to address the issue of fee collection. Most recently, in October 2014, the Council entered into an arrangement with a third-party provider, Lawserv. Lawserv provided a service to assist members with fee collection and also provided a billing and accounts receivable service. While 373 members have availed of the fee collection service since 2014, uptake on the billing and accounts receivable service was minimal.

Having undertaken an in-depth review of the Lawserv initiative, a decision was taken by Council to establish an in-house Practice Support and Fee Recovery Service, to be available to all members as part of their annual membership subscription.

The Service

The Practice Support and Fee Recovery Service, which was launched on June 22, 2020, will be focused on addressing two key member needs:

1. The provision of a Practice Support information service for members to address gaps in practice management, such as financial management and tax compliance. The aim is to provide an information service for practice management, including information in relation to the various schemes and panels operated by the State. Practice supports include a dedicated hub on the website, a range of practice information guides, and CPD events.

2. The Fee Recovery service will be available to members in respect of three overdue fee notes at a time, provided the member has made reasonable attempts to secure payment, and the fee notes are overdue for a period of six months or greater.

As part of the in-house service, the background operating systems of Lawserv will remain in use. In addition, we will retain the expertise and knowledge of Jessica McCarthy of Lawserv, who will administer the day-to-day fee collection process. The service will be overseen and managed by our newly appointed Practice Support Manager, Lynn Blake ACA. Over the coming months, Lynn will focus on the management and promotion of the Fee Recovery service, and the phased establishment of the Practice Support service.

Trends

It is worth sharing with members insights acquired over the years by the Lawserv arrangement. Since October 2014, a total of 373 members have availed of the Lawserv Fee Recovery Service. This involved 1,046 fee notes, totalling €4.3m in fees. In this time, a total of €1.3m was recovered, representing a recovery rate of 30%.

An analysis of the cases referred to Lawserv, in which professional fees remain outstanding, can be categorised under 14 primary reasons for non-payment shown in **Table 1**.

It is apparent from an analysis of this information that the first four categories account for over 69% of cases of non-payment of professional fees to counsel. These are:

1. Solicitor not co-operating.
2. Referral to the Law Society.
3. Client not in funds.
4. Counsel withdrew complaint.

Table 1: Reasons for non-payment of barrister fees.

	Reason	Explanation	% of cases
1	Solicitor not co-operating	No engagement from solicitor with LawServ after repeated attempts	21.19%
2	Referral to the Law Society	The case has been referred, on the instruction of the barrister, to the Law Society for further investigation	20.60%
3	Client not in funds	Client does not have funds to repay fee note (for various reasons such as insolvency/illness, etc.)	16.70%
4	Counsel withdrew complaint	Counsel did not pursue the case any further	10.75%
5	Solicitor firm dissolved/file transfer	This occurs when a solicitor's firm has shut down and a new solicitor takes over the case	8.95%
6	Administrative delay	Delays can occur either with the solicitor's office investigating the claim, or a State agency processing the claim	5.67%
7	Cost adjudication/taxation	Costs are being taxed	5.67%
8	Matter ongoing	The case in question has not concluded, and costs have not been fully calculated	3.28%
9	Probate	Costs cannot be finalised until probate has been completed	3.28%
10	Client in another jurisdiction	The client has moved jurisdiction, making it difficult or impossible trace him/her	2.39%
11	Client uncontactable	The client has changed address and cannot be located	0.60%
12	Client not engaging	Client is not responding to correspondence	0.31%
13	No party paid	The matter has concluded and no party to the case has been paid	0.31%
14	Proceedings issued against client	The client refuses to discharge fees, resulting in the solicitor issuing proceedings	0.30%

In addition to ongoing informal contact, the Council meets formally with representatives of the Law Society on a biannual basis. The Council has repeatedly raised concerns in relation to the responsibilities of solicitors for the payment of professional fees to counsel. The Law Society position is that all valid complaints are investigated, and a number of barristers have been successful in collecting outstanding fees through this complaints process. However, since October 2019, the Legal Services Regulatory Authority (LSRA) is the statutory body to whom complaints in relation to the conduct of legal practitioners should be referred. Indeed, since October 2019, complaints in relation to the non-payment of professional fees to counsel have been referred to the LSRA by Lawserv on a barrister's behalf. In its first biannual complaints report the LSRA has highlighted the issue of non-payment of barristers' fees. The report notes that several of the complaints received had been resolved at the pre-admissibility stage. The LSRA report reminded solicitors that they have a responsibility to ensure that the barristers they instruct are paid. It also noted that solicitors are recommended to communicate with counsel as soon as possible where issues arise, rather than simply leaving fee notes unpaid. The LSRA analysis supports the Lawserv experience, that a lack of engagement or communication by the instructing solicitor with counsel is a significant issue regarding non-payment of fees.

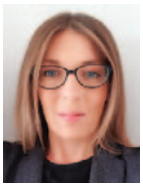
Within the Bar, what might be loosely termed cultural or tactical reasons, connected with establishing or maintaining a practice, are often cited as the reason why barristers, and in particular more junior colleagues, decide not to pursue a complaint for non-payment of fees against a solicitor. This is regularly described as a fear of being 'blacklisted' by that firm. While there are often valid reasons for non-payment of fees to counsel, as set out in the table above, the vast majority of members eventually come to the realisation that undertaking work for a firm of solicitors who have a reputation for non-payment is both unsustainable and career damaging, and rarely translates into career enhancement.

This Fee Recovery Service is intended to be of significant assistance to members seeking to recover fees. It will also enable the Council to gather information about outstanding fees and allow for closer monitoring of the problem. The information collected will be analysed (on an anonymised basis) and will allow the Council to identify trends regarding fee collection, including those who repeatedly default on payment of fees to members.

Get in touch

The Bar of Ireland Practice Support and Fee Recovery Service was formally launched on June 22, 2020. Initially, the service will be based in meeting room 10 in the Distillery Building. However, due to social distancing restrictions, the service is currently being provided online. The team is contactable via phone, email or video call.

All members are urged to visit the Practice Support and Fee Recovery hub on the website and familiarise themselves with the range of best practice information and tips on offer. For those who need to avail of the Fee Recovery Service, please contact the team, as detailed below. A starter pack will be sent to you together with the terms and conditions of the service.



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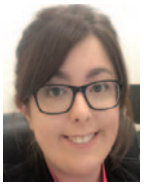

Jessica McCarthy
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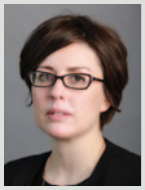
Women at the Bar

The Bar of Ireland's Law and Women Mentoring Programme continues to go from strength to strength.



Helen McCarthy BL

Nobel Prize-winning scientist Tim Hunt came under sharp criticism when he remarked that he had trouble working with "girls" because: "Three things happen when they are in the lab; you fall in love with them, they fall in love with you, and when you criticise them, they cry".

Tim's misconceptions may be some of the reasons why the majority of mentors in the fourth year of the increasingly popular Law and Women Mentoring Programme are women.

The programme began in 2016. Upon completion of a mandatory training programme for both mentors and mentees, mentoring pairs are coupled through a careful selection/pairing process. The duo then agree to meet for a total of 12 hours over a 12-month period to focus on the mentee's developmental goals.

The feedback from the 2018/2019 programme was excellent with 100% of mentors stating that they would get involved again and 88% of mentees agreeing that the programme had increased their self-confidence, resourcefulness and/or sense of capability.

The sub-committee

Having commenced life as a programme run jointly with the Law Society, the programme now comes under the auspices of the Equality, Diversity and Inclusion Committee of The Bar of Ireland. A sub-committee was established in May 2019 to look after the running of the programme and is chaired by Sara Phelan SC. Its members include Ms Justice Ní Raifeartaigh and the author. The sub-committee is also appreciative of Ms Justice Gearty's continued support for the programme since her appointment to the High Court, and for her never-ending enthusiasm, having been involved in, and at the heart of, the programme from its inception.

Overall the pairings of mentors and mentees have more than doubled since the programme's commencement, with 24 pairings this year. The sub-committee has met on six occasions and has been greatly assisted by Hannah Carney, executive coach, mentor and independent consultant, who provides invaluable experience at all stages including the crucial training provided.

Events

The feedback from 2018/2019 indicated that participants would welcome more talks and practical workshops. Taking this on board, two events were organised for 2019/2020. In November 2019 Bernie McDonnell, Group Analytic coach

and organisation development consultant, co-led a group workshop with Hannah Carney, entitled 'Rethink, Reframe, Remain – Challenges for Women Practising at the Bar'. The workshop provided a vital sounding board to collate and discuss the common challenges facing women practising at the Bar.

The only complaint about the second event in February 2020, 'Finding your Voice as an Advocate – A Workshop' with Karen Egan, was that it was not long enough! One participant summed it up when she said: "I thought Karen was really excellent and tailored the workshop to ensure that we all took something away that we can use in our everyday practice. Like the other participants, I thought the group size and mix added to the experience; it was a lovely opportunity to mix with colleagues at different stages and to recognise the common threads in all of our experiences".

Summing up

The programme continues to go from strength to strength, and to provide tangible support to women at all stages of their careers at the Bar.

The programme has been greatly supported by female colleagues, but the harsh reality is that 82% of senior counsel are male and if fewer men mentor women, this imbalance may remain. One colleague who recognised this was Noel Whelan SC, who was always a keen supporter of the initiative and whose passing has been a huge loss (not only to the programme but to the Bar as a whole). We would like to take this opportunity to mark Noel's ever-valued participation in the Programme.

Acknowledgment and thanks must be given to the staff of The Bar of Ireland – Samantha de Paor, Laura Martin and Aedamair Gallagher – who ensure that the support and institutional knowledge necessary to keep a programme like this alive is always available. Particular thanks to Samantha de Paor, whose skills have temporarily been redeployed to member account services, but the sub-committee has been left in the safe hands of Aedamair Gallagher.

The programme for 2020 will commence in October and the closing date for receipt of applications has now passed. For further information or queries, please contact **aedamair.gallagher@lawlibrary.ie**.

MEMBER COMMUNITY AT KING'S INNS

King's Inns is working on developing a member community with the help of our Member Relations Officer, Diane Sutton. Diane will be working directly with our members (Benchers, practising and non-practising Barristers, and degree of Barrister–at–Law students) to develop a range of events to strengthen relationships and provide further career and networking opportunities in Ireland and internationally.

Our members are at the heart of our community at King's Inns, contributing to the wider society in broad and diverse ways. King's Inns are excited to formalise our member relations services and are really looking forward to assisting Diane in enhancing our membership community, enriching our relationship with our graduates.

Mary Griffin | CEO and Under Treasurer

Who can become a subscribing member of King's Inns?

Current students and all graduates of the degree of Barrister–at–Law can become subscribing members of King's Inns. Full membership details and rates are available on our website at kingsinns.ie/members.

Subscription categories (January to December every year)

1. Practising – Non Law Library Members
2. Practising – Law Library Members – You are automatically a subscribing member, as a subvention to King's Inns is included in your fees to The Bar of Ireland
3. Non–Practising – all graduates who are not practising as a Barrister in or outside the State. Graduates who are practising law outside the State are also welcome to join under this category
4. Newly Qualified Barrister
5. Current degree of Barrister-at-Law students – included in their tuition fees

Benefits*

- Right to dine at King's Inns and bring guests
- Member discount on renting a carpark space at King's Inns
- 10% discount on use of the building as a venue
- 10% discount on our professional development courses (Advanced Diplomas)
- Access to the King's Inns Library
- Member social events, talks and conferences
- Right to receive notice of and attend the AGM

*For student membership benefits please refer to the student handbook.

What you need to know:

MEMBERSHIP - For full details on membership see kingsinns.ie/members.

EDUCATION - **REMEMBER!** Your subscribing membership entitles you to a **10% discount** on courses. For full list of courses, visit kingsinns.ie/education. **Applications now open for courses commencing this Autumn.**

NEWS & EVENTS - Upcoming events will be always published on our website and social channels first.

FURTHER ASSISTANCE - If you need further assistance, please contact Diane at members@kingsinns.ie. You can connect with Diane also on Twitter @DianeSutton_ and LinkedIn.

THE HONORABLE SOCIETY OF KING'S INNS
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Impact of Covid-19

The Bar of Ireland surveyed members in late May to assess the impact of the Covid-19 crisis on practice and responses to the Bar's measures to support members.

Ciara Murphy
Chief Executive, The Bar of Ireland

The journey travelled since March until quite recently has been a collective one, the primary concern of us all being our health and the safety of those we know and love. The focus is now moving from one of public health to economic data. With GDP expected to fall by 11%, unemployment at 25% and no recovery anticipated by some until 2022, it is incontrovertible that all facets of the economy will be impacted upon – including the legal profession.

Efforts made by the Bar over the course of the pandemic were many and varied, having at their centre the aim of insulating members from the immediate effects of the lockdown, and supporting them throughout. Measures included fee reductions, online offerings and supports, and engaging with partners across the justice field. This work continues, with the primary objective of getting the courts reopened and the administration of justice back in flow.

In late May, our members provided an insight into their experience and outlook on practice. The results make for stark reading, but point to a resilient and adaptable cohort of practitioners.

A response rate of 26% points to a hugely engaged membership (**Figure 1**).

Challenges ahead and administration of justice

Members were asked to rank four challenges over the coming 12 months. Financial and economic viability was identified by 70% of all respondents as their primary concern. While we might expect this to be more pronounced among younger members, that was in fact not the case, as it was similarly reflected across all years of practice (**Figure 2**).

When asked to estimate the impact on their income during the first two months of the pandemic, 44% said that that their income had fallen by in excess of 80% during that period. An additional 31% indicated that their income had fallen by between 60% and 80%.

The administration of justice is fundamental to the wider public's trust in the rule of law. As other facets of our economy and society have already begun to safely unwind, so too must our courts. Comments from members both as part of the survey and directly in response to the Chairman's communiques, have included creative and practical solutions to ensuring a speedy and safe restoration of court hearings across the State. The Council, and the Working Group on Court Business Continuity, have actively participated in a range of Courts Service consultation forums and made a number of formal submissions on resuming court business. Slowly but surely, the throughput of cases across all jurisdictions and all areas of law is gradually increasing.

Members expressed frustration across a range of issues including the management and physical infrastructure of the courts being compliant with public health guidance. These matters have been and are being actively addressed by the Courts Service. The listing (or non-listing) of matters, and the at-times fragmented approach to conducting hearings was also a repeated issue.

Finding the positives

While the prevailing narrative can seem oppressively negative, the survey did demonstrate some positive feedback and opportunities.

Appetite for technology

The Covid-19 impacts are many, and chief among them is the pivot to technology. New norms are already establishing that will endure post Covid, making practice at the Bar more efficient and enabling the profession to pursue higher-value and more purposeful tasks. Access to online CPD, the virtual Library & Information Service and ICT supports were marked as the top supports provided by the Bar (**Figure 3**).

While necessity drove demand, already there is a sense that technology will be a long-term important element of members' practice. Integrating technology within practice comes with implications for education, data security and culture for which all of us have some responsibility.

A sense of community

Collegiality, the corner stone of the profession, continues to play an important part in this crisis. Members were asked about their degree of optimism for the future. The median response was 3 (on a scale of 1-6). Within the current context this is a result that we hope to build on. One interpretation of members' high support for continued communications and online CPD is that it brings members together in a common pursuit. The task for the Council is to ensure that both onsite and online collegiate touch points are well managed and relevant.

Membership subscription fees

In the early days of this crisis, the Council considered what the immediate impact of court closures would be on members' practice. A significant part of

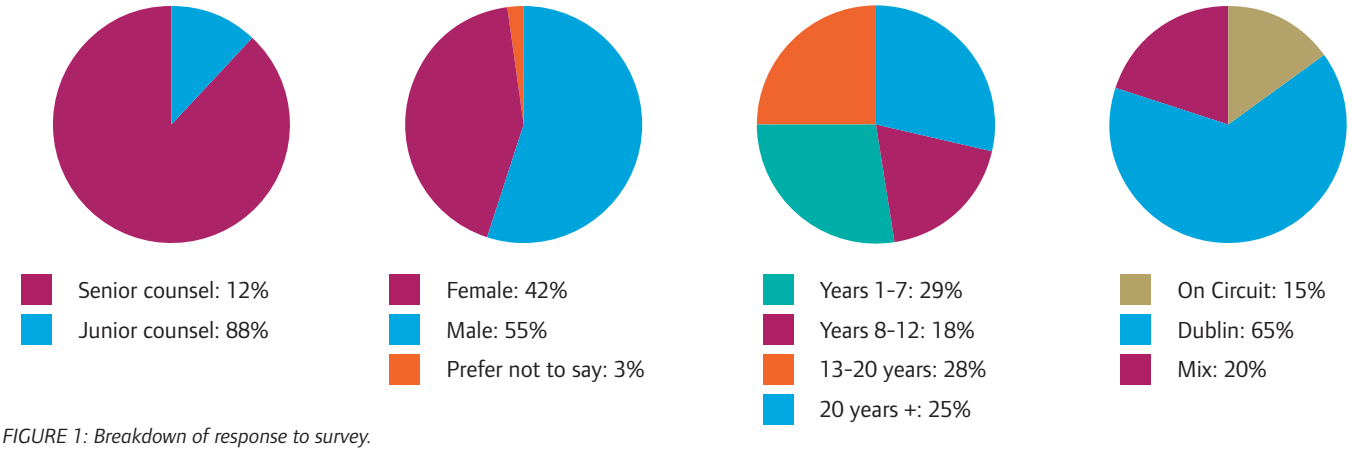

FIGURE 1: Breakdown of response to survey.

Rank which of the following challenges will present for you over the next 12 months:

Rank	Options
1	Financial and economic viability
2	Integrating better use of tech
3	Developing new areas of practice
4	Maintaining collegiality

FIGURE 2: Members ranked four challenges likely to be present over the next 12 months.

Please indicate your satisfaction with each of the following:

Online CPD offering

Library and information virtual service

ICT facilities and supports

Communication with members in relation to the crisis as it has developed

Provision of member information resources (Covid-19 info hub on website)

Financial measures implemented to support members

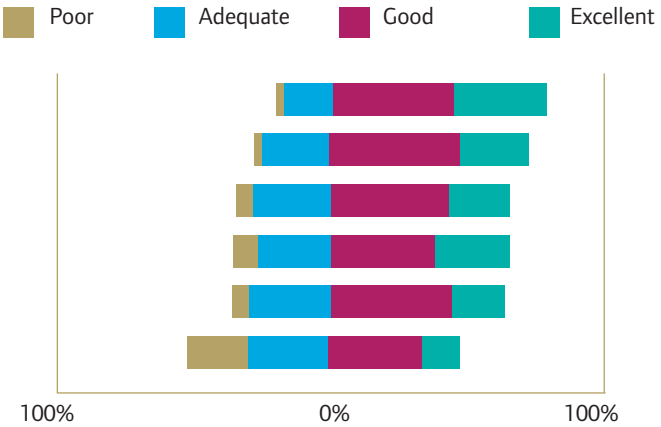

FIGURE 3: Member satisfaction with Bar of Ireland services during the pandemic.

that response in seeking to alleviate the economic burden was to offer members a 25% credit in their annual fees. At a total cost of €2.5m, the implementation of this measure was unprecedented. A significant cohort of members acknowledged the measure as a positive development, and the fact that 176 members chose to forego the subvention is appreciated by the Council and the wider membership. Some 22% of members canvassed in the survey said that they viewed the financial measures implemented to support members as relatively poor.

Conclusion

Commentators and economists have pointed out that this pandemic-driven economic shock is unique. In contrast to the 2008 debt-driven financial crisis, there is hope that the economic recession upon us will be shorter. The length and depth of containment measures will be one of the largest variables in determining the recovery. The reopening of the courts will determine the viability of practice in the short and medium term for many. We need them safely reopened and the Council will continue to do all that it can to support our members.

Shaping the progress of fragile societies

Irish Rule of Law International's work continues apace supported by the Bar of Ireland.

Aonghus Kelly
Executive Director, Irish Rule of Law International

Over the past year Irish Rule of Law International's (IRLI) work has continued. In that time over 450 detained persons have received legal services with the support of The Bar of Ireland in one of the poorest countries in the world, Malawi.

Irish and Northern Irish lawyers have also given training courses to commercial lawyers from underprivileged backgrounds in South Africa, hosted and engaged with police officers working on gender-based violence crimes in Tanzania, and assisted the Kosovo Chamber of Advocates in improving access to justice. IRLI is also now in the planning stage of a new project in Tanzania on child sex abuse cases.

Seeking justice for vulnerable persons

Our work in Malawi is focused on the central region of the country, where we have a permanent in-country presence. It has gone from strength to strength, and is especially life changing for women. In the last year, we have assisted 11 women and adolescent girls who experienced miscarriages, stillbirths or severe mental health issues and were subsequently charged with infanticide and remanded in custody. Working in conjunction with our local partners, we ensured that each woman was released on bail from prison. All had been held for periods of between six months and four years without trial. While each infanticide case is different, there tend to be common themes: abandonment, poverty, social stigma, loneliness, and fear of authority. In addition, each woman is dependent on overstretched legal aid lawyers, with little possibility of a trial in the near future.

IRLI also works to ensure that children held in police custody or prison are brought to appear before the Child Justice Court (CJC) rather than remaining in police cells

or being brought to adult prisons. In the last year, 186 children have appeared before the CJC in the capital, Lilongwe, and IRLI provided support in all of those bail applications; 167 children were granted bail and 19 were diverted from the formal criminal justice system and into communities instead. IRLI also runs a child diversion programme called Mwai Wosinthika ('chance for a change' in the Chichewa language) in collaboration with the Ministry of Gender, diverting children who come into conflict with the law away from the formal criminal justice system and into the community instead. In the last year, 46 children have passed through the Mwai Wosinthika programme.

Another challenge in Malawi is that it is common for mentally ill accused persons to be held in prolonged police detention, sometimes for up to two years, without trial. However, legally accused persons can remain in pre-charge detention in police cells for a maximum period of 48 hours. IRLI was recently made aware of two men who had been held in police cells for over five months. Our lawyers seconded to the Legal Aid Bureau, the Director of Public Prosecutions and the Malawi Police Service worked together to ensure that the men's cases were listed before the court. At court, the judge ordered that one of the accused's charges be dismissed, while the other was sent for a fitness assessment and was later discharged. Day by day, IRLI works to build the capacity of the criminal justice institutions in Malawi and to increase respect for the rights of accused people experiencing a mental illness.

Changing the system from within

IRLI's partnership with the Malawian Police Service has included the drafting and submission of a memorandum on torture in May 2019, which covered international, regional, and Malawian law as well as eight instances of torture reported to IRLI. It is hoped that this memorandum can contribute to Malawi's reporting regarding the United Nations Convention Against Torture (UNCAT) and support training courses with the judiciary regarding forced confessions. In addition, the IRLI judiciary programme lawyer is compiling training for a significant number of magistrates on the law relating to evidence obtained through torture and, in turn, advocating for the inadmissibility of such evidence. A troubling development is that the death sentence has reared its head again in Malawian jurisprudence. Four death sentences have been imposed in the last year. This represents a worrying step backwards given that the death penalty had not been imposed for almost five years prior to these decisions. IRLI is building the capacity of Legal Aid Bureau advocates and working with other organisations to advocate for accused persons in capital cases.

CPD

Due to Covid-19 restrictions, IRLI has rescheduled its Commercial Law Seminar until Thursday, October 8. This will be closely followed by our ever-popular Criminal Law Seminar, to be held in late November. Both events will be held in the Distillery Building.

We would actively encourage those interested in the work of IRLI to join us on our LinkedIn, Facebook, and Instagram pages. If you would like to donate to IRLI you can obtain details on doing so on our webpage – www.irishruleoflaw.ie. Furthermore, opportunities to work for or volunteer with IRLI will be advertised on those platforms. If you require any information on IRLI or its work please contact us on info@irishruleoflaw.ie or via our social media platforms.

IRLI is a project-oriented, non-profit rule of law initiative established and overseen by the four legal professional organisations from the island of Ireland. Originally founded in 2007 by The Bar of Ireland and the Law Society of Ireland, and joined by the Bar of Northern Ireland and the Law Society of Northern Ireland in 2015, the organisation has collaborated with academics, judges, legal practitioners, policymakers, and civil society around the world to advance collective knowledge of the relationship between rule of law, democracy, sustained economic development and human rights.

We believe that members of the Irish and Northern Irish legal professions have a significant role to play in enhancing the rule of law and shaping the progress of fragile societies. IRLI seeks to harness the skills of lawyers to use the law as a means of tackling global injustice and empowering all people to live in a society free from inequality, corruption, and conflict.

The global perspective

MD of Twitter Dublin Sinéad McSweeney talks about the company's work to address offensive content and the challenges facing the open internet around the world.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

After graduating in law from UCC, Sinéad McSweeney went straight to King's Inns, but rather than begin a career in the courts, she began work in the Oireachtas as a parliamentary transcriber. She went on to hold a series of special advisor roles, including as the first political advisor to the Attorney General: "It was an interesting experience because they were looking for somebody who could marry political nous with a law qualification, and be sensitive to the very special role the Attorney General's office has within Government".

She also worked in the Department of Justice, before making a significant move to Northern Ireland, to head up media and public relations at the newly established PSNI: "I would still say it was the best job I ever had. It was such an interesting time to be in Northern Ireland because it was just at the point of transition from RUC to PSNI, getting Sinn Féin on board for policing, all of that". She returned to Dublin to take on a similar role with An Garda Síochána, and this was where her interest in social media began: "We had the visits of Queen Elizabeth and Barack Obama, and we got the Garda organisation on Twitter for the first time because it was the easiest way to communicate directly with people, in the moment, about all the disruption".

This experience stood her in good stead when Twitter came to Dublin in 2012 and she was hired as Director of Public Policy. In 2016 she was appointed Vice President of Public Policy and Communications for the EMEA region, and she is also MD of Twitter Dublin.

> *Where we are now is light years from where it was in 2012. That has been a difficult road at times, and one that's never complete because unfortunately as humans we seem to enjoy finding new and more innovative ways in which to harass and hate each other.*

Tackling the bad actors

The last eight years have seen huge change, both in Twitter's physical presence in Dublin, and in the influence of social media in wider society: "I joined as one of 15 – now we have 400 people on site. But with that growth has come a maturing and an evolution in our policies: the ways in which the platform works, but also the way in which we strive to keep the platform safe and secure. Where we are now is light years from where it was in 2012. That has been a difficult road at times, and one that's never complete because unfortunately as humans we seem to enjoy finding new and more innovative ways in which to

A global family

Sinéad's own Twitter use encompasses everything from keeping up with global events, to the goings-on in her own neighbourhood: "We often talk about hyperlocal and hyperglobal Twitter. I follow a lot of Ranelagh accounts, so I go from The Washington Post to the New York Times to Ranelagh Life. In terms of my own tweets, I originally had a strict rule that it was professional, but I've probably become more comfortable with tweeting personal reflections or moments".

Twitter was also a tremendous source of comfort to Sinéad in the days and weeks after the death of her husband, the barrister and political analyst Noel Whelan, in July of last year. As a well-known and highly respected public figure, there was a huge response to his passing, and this was exemplified in tweets sent by strangers as well as by those who knew him well: "As we approach the one-year milestone, it's been reassuring to know that people haven't forgotten him. It's really nice to have that. Even though it's such an open public platform, I think there are moments where the community just rallies around people, whether to celebrate an achievement or to sympathise or just to be there. I really felt that in the last 12 months".

Sinéad is keen also to acknowledge the support she has received from Noel's many colleagues and friends at the Bar: "They have been an immense source of comfort and support. It has ranged from the most practical of help through to people turning up on the doorstep with an apple tart or having me around to their house for dinner. The kindness and generosity have been remarkable, and it continues right up to today".

harass and hate each other. But we are much better at keeping pace with that now. It's a completely different regime, and the level of investment is significant".

That quest to deal with offensive content is a huge issue for social media platforms. Sinéad feels it's important to see it in context: "What we would call the misuse or the bad actors is a tiny percentage of the millions of tweets we see every day. However, for the person who is impacted that is poor comfort. Our efforts are directed towards making sure that those who do not want to see those tweets don't see them, either because they're using some of the tools that are available, or because we're getting better at identifying low-quality content – behaviours which indicate that people are not interested in authentic, genuine engagement – and de-amplifying that content".

Twitter uses a range of tools to do this: "We have increased investment in the human aspect of content moderation. We're also really innovative around how we leverage technology and how we can automate a significant percentage, not of the removals, but of the surfacing of content for review and removal".

The company also works to encourage behaviour change among users, and that's one of the things Sinéad sees as a significant development: "When we look back to eight years ago, we had a very binary, 'you're on or you're off' approach. There are and will always continue to be rules on Twitter, which if broken will lead to suspension. However, there is a spectrum of rule breaking beneath that where there is scope to educate. We work very closely with safety organisations across every market in which we're present and they would also be of the view that, particularly with young people, you can get somebody who could be caught up in a moment, and actually pointing out to them that what they said was unacceptable does have an impact".

There is an argument to be made that while platforms like Twitter certainly have a responsibility to moderate content, that responsibility also extends right across society. Sinéad agrees: "I think most people are stepping up to the plate in that regard. Right across Europe we do a lot of work on media and digital literacy, partnered with UNESCO. As a company we recognise what our responsibilities are, but we won't be successful unless we continue to partner with governments, teachers, safety organisations, and youth organisations".

Land of the free

That wider approach includes legislation of course, and here in Ireland the Prohibition of Incitement to Hatred Act 1989 is currently under review. For Sinéad this is part of a wider process across Europe and indeed globally, which has implications for how the internet itself functions: "Whether there's a law or not, we continue our work to find long-term sustainable solutions to addressing hateful conduct and abuse at scale, which removes the burden from the individual user. Our concerns would be about the potential for fragmentation. We are engaged in Brussels on a range of initiatives addressed towards hate speech and disinformation, and that has worked really well in terms of trying to have some kind of consistency across the European Union".

Another concern is that legislation or regulation could, albeit unintentionally, have a stifling effect: "If you either have different laws in different countries, or laws which are overly onerous, it will by definition benefit the incumbent companies. New people entering the digital space find themselves unable to survive because the big companies have the resources to hire people or invest in the technology to do whatever is asked for by governments, where smaller companies will suffer. That's not good for the internet".

Creator

Sinéad has spent lockdown with her son Séamus, who is 11: "We get on well. We've had an ok lockdown, just the two of us rattling around here". She loves to crochet, and is a keen Lego builder, with quite a collection at this stage: "People come into our house and see lots of Lego and they think it's Seamus', but it's mostly mine!"

Debates around offensive content, or hate speech, are inevitably bound to discussions around free speech, freedom of expression, democracy itself. Not long before our interview President Donald Trump issued his Executive Order on Preventing Online Censorship. Internationally, Twitter and other internet platforms operate in countries where government interference in the internet as a way to stifle opposition is common. For Sinéad, what's important is that the response is consistent, and based on clear principles: "Twitter starts from a baseline of value of the open internet, freedom of expression and user privacy. Once we start from those principles, we can attempt to navigate most problems and challenges. President's Trump's target is Section 230, which is the protection for platforms like ourselves. But it's not just a protection for our platforms, it's a protection of innovation and freedom of expression. We recently supported Access Now and their KeepItOn campaign, which highlights issues around internet shutdowns and throttling of internet traffic in countries where governments decide they don't like what's happening on the platform. If we have to continue to have those discussions and arguments in the US as well, that's what we will do".

The Executive Order also once again raises the debate about whether social media platforms should be treated as publishers: "I think we're more likely to see a situation where there's some kind of a hybrid definition, because, frankly, if we were to be defined as publishers and having to address ourselves to the various rules and standards that precipitates, it just wouldn't be sustainable. From a Twitter perspective, it would be unfortunate because our relationship with news media and publishers is quite different from some of the other platforms. I think that middle ground between publisher and content provider is something that we'll see more of".

These are all vital debates, and part of negotiating them is an ongoing relationship with regulators around the world. For Sinéad that relationship is particularly important – as Dublin is home to Twitter's European headquarters, the Office of the Data Protection Commissioner here assumes a particular significance: "The interactions are good. They're open and robust, as they should be. The Irish DPC's job is to protect the individuals who use our platform, and we have a shared interest there. We have very regular engagement, and for us the system under GDPR, with the Irish DPC as our lead regulator, works".

Twitter in the courts

The issue of protecting user privacy has particular relevance in the legal sphere where the content of social media accounts increasingly appears in discovery requests for both civil and criminal cases. For Twitter, protection of user privacy is paramount, including if that user has been accused of wrongdoing, and procedures must take that into account at all times: "We have dedicated teams who deal with requests, whether it's from law enforcement directly or requests for user information that come up in the context of legal proceedings. We don't and can't share user information on anything less than a legal requirement, which is why it would either be a police request or a judge's decision. We operate in many countries around the world and being able to protect user information and point to a common standard globally about what it is we require before we share private user information that could eventually identify somebody, is important to us".

Sinéad's own background means she has a particular perspective on these issues: "I'm probably unusual within Twitter to have worked on both sides of that discussion. We recognise that in most instances where there is a request for user information, it is to vindicate the rights of a victim of crime, or to assist in remedying a wrong. But there are places in the world where that is not the case, and therefore it is important to us to have clear values and principles which underline our decision-making".

Covid and the future of Twitter

Twitter was one of the first companies to send its employees home to work at the onset of the pandemic, and Sinéad says it's likely they will be one of the last to return to the office: "It will be a very gradual and deliberate re-population. We will have to rethink some of the underlying cultural aspects of our office, of common spaces and so on, but there's some interesting work going on in that regard".

Twitter has played an extremely interesting role during the crisis, which has brought some of its more positive aspects to the fore. Sinéad was pleased to see these interactions, and points to actions the company took to ensure its role in disseminating information was a responsible one: "We definitely saw an increase in the number of people using the platform. People were on Twitter to get the latest information about Covid in the first instance, and then as other issues emerged, whether it was the light-hearted moments or indeed the more serious moments like Black Lives Matter. We recognised very early on that if people were coming to Twitter for authoritative information, we needed to be sure they were seeing that, so the policy team I lead in this region worked with the HSE in Ireland, the NHS in the UK and right across the region with local health authorities to ensure that we had dedicated prompts pointing to verified information that we could stand over".

The protection of the open internet will remain a priority for Twitter in future: "How do we protect the open internet from threats from a range of places, not from the usual corners of the world where we might suspect? [How do we] keep an internet that's global, that gives users choice, that protects privacy? That we don't tolerate blocking of internet access, throttling of internet traffic, or data localisation, which is really just pulling user information closer to government so that they can access it. Transparency around algorithms: 'why am I seeing certain content and not other content?' – those are the big challenges that our space and Twitter in particular are facing, and we're really interested in engaging and being thought leaders across those".

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

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A directory of legislation, articles and acquisitions received in the Law Library from May 9, 2020, to June 19, 2020
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ANIMALS

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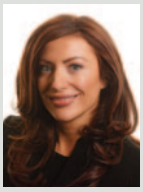
Damage limitation

The recent Supreme Court judgment in *Morrissey v HSE* and others[1] sets out with admirable clarity the standard of approach to be applied when determining issues of professional negligence, in this case in relation to professionals involved in cancer screening.

Sara Moorhead SC



Maria Watson BL

The judgment in *Morrissey v HSE* and others was an appeal from the judgment of the High Court (Cross J.)[2] where the plaintiffs were awarded the sum of €2,152,508 against all three defendants and an additional sum of €10,000 in nominal damages as against the HSE in relation to professional negligence in the reading of cervical smear tests. However, the case leaves open the vexed question of the extent to which there can be a second cause of action arising out of the same negligence, in this context to recover for loss of services not recouped in the initial claim.

The defendants in the proceedings were the HSE, Quest Diagnostics Incorporated and Medlab Pathology Limited (to whom the HSE had contracted out the cervical screening). The Supreme Court granted leave for a leapfrog appeal[3] for a number of reasons, including that it was considered necessary in the context of the setting up of the CervicalCheck Tribunal that there be clarity in respect of the legal test to be applied.

This judgment must be seen against the backdrop of the controversy that arose after the judgment in the High Court and the use of the words "absolute confidence" in determining what was to be the standard to be applied when carrying out a screening test. The Supreme Court specifically looked at the test of absolute confidence in the context of the role of experts and opined in detail as to the role of an expert in legal proceedings.

This judgment must be seen against the backdrop of the controversy that arose after the judgment in the High Court and the use of the words "absolute confidence" in determining what was to be the standard to be applied when carrying out a screening test.

The Court also restated the principles applicable to professional negligence, which, although they remain unchanged, are elegantly restated and expressed with a great deal of clarity.

The judgment confirms the general approach to the cap on general damages. Readers will be surprised that although the perception is that general damages in Ireland are excessive, this jurisdiction is in the mid-range and awards are somewhat less than in other jurisdictions. This article will reference in passing the distinction between vicarious and primary liability dealt with by the Court, but the writers believe that this should be the subject of a separate article having regard to the complexity of the issues. Finally, the article will deal with fatal claims and whether, if a claim is taken by a plaintiff while alive, their family is in a position to take a further claim after their death.

The facts

Ruth Morrissey (sadly, now deceased) was married to Paul Morrissey and they have one young daughter. Ms Morrissey underwent a smear test in August 2009 that was reported as normal, and she was advised to return after three years. She went back in August 2012, when she was advised that her smear test was normal and she was again recommended for routine recall after three years. In May 2013, she had symptomatic bleeding and received a diagnosis of invasive squamous carcinoma of the cervix. Surgery was required and the cancer appeared to have been treated successfully. In 2018, there was a serious recurrence of the cancer and tragically, she then received a terminal prognosis. Ms Morrissey passed away earlier this month after the Supreme Court judgment was delivered.

The Court set out clearly the role of a professional and in particular the role of a screener. It laid heavy emphasis on the extent to which they must have due regard to the evidence of experts as to the standard to be applied and that they will then apply the facts to such standard.

Post the 2014 diagnosis, a look back was undertaken of the smears carried out in 2009 and 2012. They were reviewed and the 2009 slide was found to be incorrect and contained borderline nuclear abnormalities. The 2012 slide was reviewed and found defective because it was considered that insufficient cells were available to read it. CervicalCheck, represented by the HSE in these proceedings, which had contracted out cervical screening to the second and third named defendants, was told of these results in 2015. Ms Morrissey's treating doctor was told in June 2016, but the results were not discussed with her and it was only in 2018 when she made enquiries that she was made aware of the details.

Her claim was that if the original smears in 2009 and 2012 had been adequately read, she would have been investigated for cancer at that point in time, would have been found to have a pre-cancerous condition, and would not face the terminal prognosis that she now faces.

Standard of care/standard of approach and absolute confidence

Clarke C.J., who gave the judgment of the Court, reiterated that the principles laid down in *Dunne v The National Maternity Hospital*[4] remain the principles applicable not just to medical negligence, but to all professional negligence. In so doing, the Chief Justice made it clear that the use of the phrase 'standard of care' can give rise to concerns and confusion, particularly when one is dealing with medical practitioners. He pointed out that in clinical negligence cases, a court could be dealing with care in a medical sense and therefore, to avoid any confusion, he decided to use the term 'standard of approach'. It should be noted that this approach has been adopted and applied more recently in the case of *Freeney v HSE*,[5] a decision of Hyland J. regarding the BreastCheck screening service, where she dismissed the claim on the principles laid down in this judgment.

Clarke C.J. went on to state that the starting point of any professional negligence case requires the identification of the standard of approach that should be applied. In all professional negligence cases, but in particular medical negligence cases, he accepted that there are often two standards of approach or two different practices adopted. It is commonly accepted as a principle of tort law that it is not negligent to follow one rather than the other. The test is whether the course of action actually adopted is consistent with the exercise of ordinary care, which could reasonably be expected of a professional of the type under consideration. This statement of the law is uncontroversial and represents the law as has been articulated over the years, but it is helpful to practitioners to have it restated in such clear terms.

In this case, the issue of standard of approach came down to the question of establishing what the relevant professionals involved in screening should have done and whether it had been demonstrated that the actions of any of the screeners had fallen below the reasonable standard that professionals of that type could be expected to have applied.

At paragraph 6.13 of the judgment, Clarke C.J. usefully summarises the role of the court vis a vis the evidence of experts. He emphasises that generally the role of the court in relation to the evidence of experts is a question of fact. The court will receive the expert evidence as to how professionals of the type in question would generally go about their work. The court then assesses the evidence given by the professionals as to the standard which they themselves regard as being applicable to someone of the standing and skill of a professional being sued.

Clarke C.J. was at pains to emphasise the role of the court, in particular having regard to the controversy post the High Court judgment where some commentators in the public domain appeared to be of the view that the judge had devised the absolute confidence test. There had been significant media criticism and a view that the CervicalCheck screening system as a whole was under threat by virtue of the imposition of this absolute confidence test by the High Court.

The Supreme Court pointed out that the absolute confidence test had in fact come from an English case, Penney, *Palmer and Cannon v East Kent Health Authority*,[6] and derived from the agreed evidence of the experts in that case. In that particular case, the trial judge held at page 127:

> "All five [experts] agreed that if the screener was in any doubt about what he saw on the slide he should not classify the smear as negative. In their evidence before me, each expressed the point differently but the conclusion was the same".

As Clarke C.J. pointed out, the trial judge found the absolute confidence test to be applicable in this jurisdiction, taking account of the *Penney* case but primarily emanating from the evidence of the experts who were all of the opinion that it was the correct test to be applied. Therefore, the test was not imposed by the court in the UK nor was it being imposed by the judge in the High Court. It was the agreed position of the experts.

Clarke C.J. noted that despite the media commentary and criticism, there was no real difference between the experts that the appropriate methodology by which a screener should be judged is whether they have absolute confidence in the contents of what they are seeing on a slide. If they do not, it should be moved on to the next level. As the Supreme Court pointed out, when it comes to professional negligence, the standard is laid down by the experts who give evidence. The court assesses the factual situation by reference to that expert evidence and in this particular instance, the expert evidence was to the effect that a competent screener should not give a clear result in the case of doubt.

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The Court set out clearly the role of a professional and in particular the role of a screener. It laid heavy emphasis on the extent to which they must have due regard to the evidence of experts as to the standard to be applied and that they will then apply the facts to such standard. The Court also emphasises that in reading slides in this particular area, the allegation is not that they were negligently read but that they were deemed to be inadequate.

The Supreme Court then went on to distinguish between the use of expert evidence in a case like this and in other cases where the role of the expert may simply be to tender evidence that is useful to a greater or lesser extent in assisting the judge to reach a conclusion on the facts. Examples cited in the judgment are situations involving either engineers or doctors giving evidence as to whether it is likely that injuries or accidents could be caused in a certain way. As noted by Clarke C.J., that is very different to the role of the expert in these particular cases, which is to establish the standard that should be applied.

This is extremely useful for practitioners due to the tendency in recent years to underplay the role of experts in certain cases. The clear exposition of the different roles of expert witnesses and their ability to assist the court is extremely welcome.

Negligence in fatal claims/cause of action

In relation to the right to recover damages, the Supreme Court left over to another day the extent to which there could be two causes of action arising out of the same event.

In its factual context, Ms Morrissey brought proceedings for general damages for her pain and suffering. She was also entitled to sue for her loss of earnings into the future if she would have been working but for her cancer. The loss of earnings into the future claimed in these type of cases is based on a doctrine known as the lost years' principle, which provides that the court takes into account the extent to which life expectancy has been reduced, less the living costs that would have occurred during those years, and deducts it from the potential future loss of earnings. In some cases, that may be a significant sum and in other cases it may not. Furthermore, if the plaintiff in question was not working outside the home, there might be no loss of earnings. The question that has arisen in many cases recently is the extent, if any, to which the family member of a person who is going to die is entitled to recover for the loss of their services into the future and, in particular, childcare costs, in the context of the case being brought while the person is still alive. In this particular case, the High Court permitted Mr Morrissey, the second named plaintiff, to pursue a claim for loss of services into the future. The High Court looked at what childcare costs he would have after his wife died and awarded him for that loss.

Part 4 of the Civil Liability Act 1961 (as amended) provides for a fatal claim after the death of the deceased. In such a fatal claim, the family would be confined to claiming for solatium and any loss of services, among other headings. They would not receive general damages. If the claim is brought while the person who is ultimately going to die is alive, they are entitled to general damages; in this case the sum of €500,000 had been awarded by the High Court.

The issue that the Supreme Court failed to resolve is whether two claims can arise and be maintained, namely, one when the person is alive, and the second when that person is deceased, for headings of damages that are not recovered in the initial claim. In this particular case, the Supreme Court overturned the High Court decision insofar as it awarded damages to Mr Morrissey for the potential loss of services of his wife. The Court's view was that all that could be recovered was loss of earnings for Mrs Morrissey for her future earnings, subject to the lost years' principle. The Court appears to have been reluctant to go further because there may be a significant financial difference in the sums recovered depending on which course of action is taken.

The entitlement to potentially have two chances to recover damages has to be seen in the context of *Hewitt v HSE*,[7] which made it clear that any action arising out of negligence must be initiated within two years of the negligent act occurring rather than two years from the date of the death of the person to whom the negligent act occurred. This means that in many cases, it is not open to persons to wait and see. However, the result is that while general damages can be recovered as the person is alive, there may be significantly less special damages awarded to them, particularly in a case where they are not working outside the home. This does mean that ultimately the family may not be fully compensated for the negligent act of the defendant because they cannot recover for significant ongoing costs, such as the care of children, if the deceased was very young.

The Supreme Court essentially left over to another day the question as to whether in the case of an injured party who is deceased but during his/her lifetime has taken proceedings, the family is then precluded from taking further proceedings. From the case law to date, and having regard to other jurisdictions, it would appear that given the current legislative enactments in this jurisdiction, it would be difficult to do so. However, there is no doubt that the Supreme Court was sympathetic to the fact that either cause of action may give rise to an award of damages that does not reflect the true position and the problems there may be in persons not recovering all the damages they might be entitled to recover through an inability to take two actions. The Supreme Court decided that the issue awaits a final determination. Without specifically saying so, the Supreme Court ultimately appears to have been of the view that the Civil Liability Act 1961 (as amended) is somewhat obsolete, that anomalies exist in terms of the entitlements of litigants to recover, and that people may be left in difficult situations.

However, the Court was of the view that the trial judge could not add in the loss of services to the existing claim and that that portion of the claim had to be disallowed.

Other issues

The Court also carried out a detailed analysis of primary liability versus vicarious liability in respect of the role of the HSE operating the CervicalCheck screening system. Clarke C.J. ultimately held that the CervicalCheck screening system could have been done by the HSE itself and they could have retained control of it and therefore, were primarily liable for the actions of the laboratories. However, in this particular case, as there was a contractual indemnity existing between the laboratories and the HSE, the laboratories had to pay. A number of issues arise in this section of the judgment but due to space constraints, they are beyond the scope of this article.

Finally, the Court dealt with the question of the cap on general damages. The cap up to that point had been €450,000. In this particular case, the trial judge awarded €500,000. While the Court was of the opinion that it was not correct for the trial judge to ignore what had been the cap in place, namely €450,000, and that he should have simply expressed concerns that it was too low, it did not interfere with the award, expressing the view that it came within the middle range of sums awarded. The Court cited the example of Germany, where awards for general damages for severe cerebral palsy could be in the region of €700,000. The guidelines in Northern Ireland provide that quadriplegia attracts awards of between £475,000 and £700,000, and in the UK quadriplegia would generally attract an award between £284,610 and £354,260.

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The Court followed the approach taken by Irvine J. in the most recent Court of Appeal decisions in determining that when awarding sums for general damages, the court should look at the cap on general damages and all less serious injuries should be determined on a proportionate basis, having regard to a comparison between the injury suffered and those injuries that qualify for the maximum amount. It went on to emphasise that those that attract the cap may come into different categories and it would be somewhat invidious to compare one against the other.

Conclusion

This judgment covers a multiplicity of issues regularly encountered by practitioners in personal injuries claims, while restating with admirable clarity the principles applicable. The one issue that remains to be resolved is the entitlement to recover after the death of the person to whom the negligent act occurred, and whether there is a residual claim if they have sued during their lifetime. There is no doubt that that is a case for another day. Certainly the Supreme Court was reluctant to venture further. If it had done so, it might have been forced to conclude that there was only one entitlement to sue. The Court appears to be inviting the Oireachtas to legislate to overhaul this area to reduce the complexity regarding heads of damages. It remains to be seen whether the Oireachtas will take this on board and move to address the manner in which damages are formulated to do justice to all parties.

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Freedom to travel

With limited scientific information available regarding Covid-19, the EU has taken a strict approach to travel restrictions; however, this may be open to challenge on grounds of proportionality as more information becomes available in future.[1]

Anthony Lowry BL

Zachary Murtagh BL

The Covid-19 pandemic has necessitated the adoption of draconian restrictions on the free movement of citizens both within and outside of the EU. The purpose of this article is to examine the legal basis for the adoption of such measures under European Union (EU) law and to consider the application of those principles in the specific context of the Covid-19 pandemic.

The TFEU and the Directive

The source of the power to adopt restrictions on the free movement of EU citizens and their family members is contained in the Treaty on the Functioning of the European Union (TFEU) and Council Directive 2004/38/EC (the Directive).

Article 21.1 of the TFEU provides that: "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

The detailed limitations and conditions governing restrictions on the free movement of Union citizens are now largely (though not exclusively) laid down in the Directive.[2] Where a Union citizen or their family members qualify for a right of entry and/or residence in a member state,[3] Chapter VI of the Directive sets out the rules governing how and when that state may impose restrictions upon such rights on grounds of public policy, public security and public health. Under the heading 'General Principles', Article 27.1 of the Directive provides that member states may restrict the freedom of movement and residence on grounds of public policy, public security or public health. These grounds cannot be invoked to serve economic ends. Article 27.2 imposes limits on the exercise of this power with regard to derogations based on public policy or public security. In particular, any measures adopted to serve those ends must be proportionate and based exclusively on the personal conduct of the individual concerned. They cannot be relied upon to justify measures of general prevention.[4]

Article 27.2 of the Directive is derived from the case law of the Court of Justice of the European Union (CJEU) prior to the adoption of the Directive[5] and has received consideration by the Irish Superior Courts on a number of occasions.[6] However, Article 27.2 of the Directive applies only where the public policy or public security grounds of restriction are invoked by a member state. The rules governing the public health derogation to address a threat such as Covid-19 are separately set out in Article 29 of the Directive.

The public health derogation under Article 29 of the Directive

Article 29 of the Directive states:

"1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host member state.
2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.
3. Where there are serious indications that it is necessary, member states may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine".

If a Union citizen is found to have contracted a disease with epidemic potential, an infectious disease or contagious parasitic disease within three months of arrival, then that person may be expelled to their member state of origin.

Expulsion/refusal of entry on grounds of public health

If a Union citizen is found to have contracted a disease with epidemic potential, an infectious disease or contagious parasitic disease within three months of arrival, then that person may be expelled to their member state of origin. Pursuant to Article 27.4, the member state of origin must admit their own national to their territory following expulsion from the host member state. This limitation period represents the attempt to reconcile three objectives:

- to permit member states to take timely action to prevent the spread of disease in the host member state by way of expulsion either at the border or within three months thereafter;
- to prevent the export of disease to a Union citizen's member state of origin where the disease is likely to have been contracted in the host member state; and,
- to acknowledge that the removal of a Union citizen residing in the host member state for a period in excess of three months will impair the right of free movement to a significant extent.

The principle of non-discrimination

In order to invoke the derogation based on public health, a member state must adopt genuine and effective measures addressed to their own nationals to combat a disease such as Covid-19.[7] This requirement ensures respect for the prohibition of discrimination on grounds of nationality contained in Article 18 TFEU and prevents contrived reliance by member states on the derogating provision.

Medical examinations on arrival

According to the article-by-article commentary explanatory memorandum in respect of the original Commission proposal: "[Medical certification] provisions may be used only in exceptional circumstances, where there are serious indications that the person concerned suffers from one of the diseases or disabilities that can justify refusal of leave to enter or reside and provided that the host member state bears the full costs of the examination. Such examinations may on no account be carried out as a matter of course".[8]

To reflect this limitation, Article 29.3 of the Directive states that medical examinations may not be required as a matter of routine.

The public health derogation as interpreted by the CJEU

The operation of Article 29 of the Directive in practice has not, as yet, been the subject of specific assessment by the CJEU. Nonetheless, the power to derogate on grounds of public health has been addressed by the Court in the context of the free movement of goods. This case law provides some guidance as to how the CJEU may evaluate restrictions imposed on the free movement of persons to protect against the transmission of Covid-19.

In the case of *United Kingdom v Commission*,[9] the CJEU addressed the legality of a Commission decision imposing a temporary export ban on bovine animals and meat from the United Kingdom to other member states, and third countries, adopted as an emergency measure intended to prevent the spread of bovine spongiform encephalopathy (BSE) disease.

The Commission decision was challenged by the UK on grounds, inter alia, that the ban breached the principle of proportionality. The CJEU noted that the principle of proportionality was one of the general principles of EU law and stated:

"At the time when the contested decision was adopted, there was great uncertainty as to the risks posed by live animals, bovine meat and derived products [and] where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent".

Ultimately, the CJEU upheld the decision on the basis that it was an emergency measure, but emphasised the need to review the measures, following detailed scientific study of BSE disease. Notably, the CJEU endorsed the so-called precautionary principle in this case due to the scientific uncertainty surrounding the risk posed by diseased British beef.[10] In *Commission v France*,[11] the CJEU elaborated upon the scope of the precautionary principle, stating:

"As regards the objective of protecting public health, it is for the member states, in the absence of harmonisation and in so far as doubts subsist in the current state of scientific research, to decide at which level they intend to ensure the protection of the health and life of persons…"

Accordingly, if a high degree of scientific uncertainty surrounds a disease such as Covid-19, wide discretion will be afforded to member states to impose measures of their choosing to protect public health. Such measures must be subject to ongoing review as scientific data clarifies the nature and extent of the risk presented by the disease.

Guidelines for adoption of restrictions in cases of viral pandemics

The current pandemic presents a significant threat to public health. The level of future risk Covid-19 poses remains uncertain. In March 2020, as the pandemic was spreading throughout the EU, the Commission published guidelines for member states regarding the use of public health restrictions on the free movement of persons in order to protect public health.[12] Under the Commission's guidelines,[13] member states are permitted to:

- put in place entry screening measures, including primary and secondary screening, to assess the presence of symptoms or the exposure to Covid-19 of travellers arriving from affected areas;
- allow primary screening to include initial assessment by personnel, not necessarily medical trained, including visual observation of travellers for signs of the disease, measurement of travellers' body temperature and completion of a questionnaire by travellers asking for presence of symptoms or exposure to the infectious agent;
- permit secondary screening to be carried out by personnel with medical training, encompassing an interview, a focused medical and laboratory examination or second temperature measurement;
- provide exit screening measures to assess the presence of symptoms and/or exposure to Covid-19 of travellers departing from affected countries – travellers infected with Covid-19 should not be allowed to travel; and,
- establish measures for isolation of suspected cases and transfer of actual cases to a healthcare facility, with authorities on both sides of the border agreeing on the handling of cases of people considered as posing a public health risk such as further tests, quarantine and healthcare – either in the country of arrival or by agreement in the country of departure.

These guidelines endeavour to bring the screening process in line with the restrictions laid down in Article 29.3 of the Directive and are intended to be applied where the threat of Covid-19 exists. As will be recalled, medical examinations are only permissible where "there are serious indications that it is necessary" and cannot be implemented as a matter of routine practice.

The guidelines limit primary screening to travellers arriving on a direct or indirect connection from an affected area or country, and limit the more intrusive secondary screening process to those initially filtered through the primary screening process. In this manner, the screening is, arguably, limited to cases where there are "serious indications" that a medical examination is necessary.

The proportionality of such testing will depend upon the extent of the present threat posed by Covid-19,[14] as well as the effectiveness of such testing at preventing the spread of the disease.[15] Such screening could prove to be ineffective in preventing spread of the disease due, inter alia, to the fact that infectious people may be pre-symptomatic or asymptomatic at the time of screening.

Justifying broad testing of travellers will probably require reliance upon the precautionary principle. Having regard to the nature and extent of the threat that Covid-19 presents to public health, as well as the scientific uncertainty regarding how best to combat the disease, member states are entitled to assume the worst (that every traveller may be carrying the illness) and take protective measures on that basis. However, reliance upon the precautionary principle necessitates review of their effectiveness in the light of up-to-date scientific research.

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Refusal of entry

The Commission guidelines provide that a member state must not deny entry to EU citizens or third-country nationals residing on its territory. This is intended to reflect the three-month limitation period laid down in Article 29.2 of the Directive and ensures that people who have resided in the host member state for a period in excess of three months may not be denied re-entry following their return from a trip abroad.

In the absence of a system of registration of Union citizens in Ireland, the operation of this limitation may give rise to practical difficulties in that proof of residence for a period in excess of three months prior to departure and re-entry will be difficult to establish in practice. Member states can require such persons to undergo self-isolation upon return from an area affected by Covid-19, provided they impose the same requirement on their own nationals. Furthermore, the guidelines authorise member states to refuse entry to non-resident third country nationals where they present relevant symptoms or have been particularly exposed to the risk of infection and are considered to be a threat to public health. This latter authorisation raises two questions:

- does this apply even where a family member is seeking to join a Union citizen lawfully residing in the host member state in accordance with the Directive?; and,
- does this also apply to third-country nationals potentially in need of international protection?

The first of these questions remains unclear. Undoubtedly, such family members are entitled to the benefit of Article 29, in conjunction with Article 27.1 of the Directive. Although medical examinations may be conducted whenever "serious indications" exist that this is necessary, nothing in Article 29 expressly authorises the expulsion/refusal of entry of persons presenting relevant symptoms or who have been particularly exposed to risk of infection but are not yet diagnosed with the disease as such.

Again, recourse to the precautionary principle will be necessary to justify such a refusal of entry on the basis that, in the absence of reliable/sufficient testing for Covid-19, a member state is entitled to err on the side of caution.

However, the position under this heading is further complicated by the fact that the guidelines appear to require the member state of arrival to treat a Union citizen with suspected Covid-19 through their own healthcare system "or by agreement in the country of departure". Where Union citizens and non-EU national family members are entitled to entry under the Directive, both categories of person are also entitled to the benefit of the limits contained in Article 29. Whereas a Union citizen is entitled to treatment in the member state of arrival (at least on a default basis), non-EU national family members may simply be refused entry to the member state of arrival. This difference in treatment will require justification.

The second question is not directly answered by the border management guidelines. However, the answer may, by inference, be contained in the Commission Covid-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens and on the effects on visa policy[16] that is in place for the EU7+[17] area. This guidance imposes a temporary restriction on entry by third-country nationals into the EU7+ area for non-essential purposes. Notably, third-country nationals in need of international protection are exempt from this entry ban. By extension, it is presumed that any refusal of entry addressed to a non-resident third-country national must respect the principle of non-refoulement such that a refusal of entry cannot be made where a person seeks international protection in the member state of arrival.

Conclusion

The application of the public health derogation to the free movement of persons is likely to differ significantly from derogations based on public policy and public security. In particular, the proportionality of a protective measure based on public health is, in principle, entitled to the benefit of the precautionary principle.

The CJEU is likely to show greater deference to member states when adopting restrictions on a temporary basis at a time when scientific assessment of the risk is uncertain. As scientific consensus regarding the extent of the risk posed by Covid-19 grows, member states' protective actions will become more susceptible to challenge on grounds of infringement of the principle of proportionality.

References

1. This article is an edited version of a webinar presentation of the Immigration, Asylum and Citizenship Bar Association (IACBA). The presentation is available online at both the IACBA website and The Bar of Ireland website.
2. The CJEU has held that the Directive may apply, *mutatis mutandi*, where a right of residence is derived solely from the TFEU. See, June 5, 2018, Coman and Others, C-673/16, EU:C:2018:385; and, September 13, 2016, CS, C-304/14, EU:C:2016:674.
3. For example, on the basis that a Union citizen is working or self-employed in the state, is studying in the state, or is residing with sufficient resources not to become a burden on the state while holding health insurance. The right of residence extends to the Union citizen's family members (defined in Article 2.2).
4. See *McCarthy and others*, C-202/13, EU:C:2014:2450.
5. See, *inter alia*, Case 36/75 *Rutili* [1975] ECR 1219; Case 30/77 *Bouchereau* [1977] ECR 1999; and, Cases C-82/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I 5257.
6. See, inter alia, *Balc v Minister for Justice and Equality* [2018] IECA 76; *M. (Lithuania) v Minister for Justice and Equality* [2016] IEHC 432; *GC v Minister for Justice and Equality* [2017] IEHC 215; and, *DS v Minister for Justice* [2015] IEHC 643.
7. See, by analogy, joined cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665.
8. 2001/EN/1-2001-257-EN-F1-1.
9. C-180/96 R, EU:C:1996: 308.
10. For further discussion of the precautionary principle see: Communication from the Commission on the Precautionary Principle, COM/2000/0001 final.
11. C-333/08, EU:C:2010:44.
12. Specific reference is made in the Guidelines to entry into the Schengen area but they nonetheless provide an insight as to how Ireland can adopt restrictions under Article 29.
13. Covid-19 Guidelines for Border Management Measures to Protect Health and Ensure the Availability of Goods and Essential Services C(2020) 1753 final.
14. The Commission has begun the process of lifting restrictions as the threat of Covid-19 recedes: Communication from the Commission towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – Covid-19 2020/C 169/03.
15. In the European Centre for Disease Control (ECDC)-published 'Guide to Public Health Measures to Reduce the Impact of Influenza Pandemics in Europe: 'The ECDC Menu'', the ECDC noted that both entry and exit screening was quite ineffective in the case of SARS.
16. C(2020) 2050 final.
17. All Schengen member states, as well as the four Schengen-associated countries.

Force majeure clauses in the time of Covid-19

There are a number of factors to consider for those attempting to invoke a force majeure clause in a contract during the Covid-19 pandemic.

Alan O'Connor BL

The Covid-19 pandemic, and Government responses to it, have caused enormous economic upheaval. At the time of writing, Ireland is on the path out of lockdown, but disruption is expected to continue at some level for months – and potentially longer – into the future. The disruption caused by the crisis has taken many forms, from regulatory restrictions on the operation of businesses, to interruptions of global supply chains and extraordinary shifts in consumer demand for an eclectic variety of goods and services. These factors will doubtless cause difficulties for many businesses in performing contractual obligations. *Force majeure* clauses (FMCs) commonly included in commercial agreements will provide relief for some affected businesses.

The applicability, effect and procedure required to invoke an FMC in any case will depend on the words used in the contract, interpreted in accordance with the usual principles of contractual interpretation, in the context of the relevant factual matrix. While the parties to a contract are free to agree whatever terms they wish, for an FMC to be relied upon, some event coming within the ambit of the clause must have occurred. Normally there must be a causal connection between the *force majeure* event and a difficulty in performing the contract. It is for the party seeking to rely on the FMC to prove the occurrence of the *force majeure* event and the causal connection with the failure to perform. Normally a party seeking to rely on an FMC is required to notify the other party in order to avail of the FMC. The effect of successfully invoking an FMC depends on its terms, and could include suspending or discharging performance, and providing for the costs incurred by the parties.

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Force majeure events

The first step in assessing whether an FMC may be relied upon in a particular set of circumstances is to analyse the wording of the clause to identify the circumstances in which it applies. Terms that are frequently included as *force majeure* events, and which may be particularly relevant to the Covid-19 crisis, include 'epidemic', 'pandemic', 'infectious disease', 'government action', 'national emergency', 'prohibitive governmental regulations', and 'compliance with all legislation, statutory rules, orders, regulations or directions'. If such terms are included as *force majeure* events, there is a good chance that a party will be able to rely on the clause to escape liability for non-performance arising out of the Covid-19 crisis.

More general words, such as 'circumstances beyond the control of' the party affected, or clauses providing relief in the event of '*force majeure*', 'vis major', or 'act of God', may also cover events resulting from the Covid-19 crisis. An act of God does "not mean the act of God in the ecclesiastical and biblical sense, according to which almost everything is said to be the act of God,"[1] but rather is an accident caused by natural causes without the intervention of humans, which could not

reasonably have been anticipated.[2] There is a strong argument for such a clause covering the effects of the pandemic. '*Force majeure*' and 'vis major' appear to be broader, encompassing events caused by human action as well, so should also cover disruption caused by the pandemic. However, in each case, it is necessary to look at the particular wording of the contract, and the reasons for the disruption to the performance of the contract, to determine whether the FMC may be invoked. The ejusdem generis rule may be used to limit the scope of events covered by general words at the end of a list of more specific events in such a clause.[3]

Insofar as the performance of an obligation is alleged to be affected by the general economic downturn precipitated by the Covid-19 crisis, a party may not be able to rely on an FMC that does not refer specifically to the general economic consequences of other *force majeure* events. The general position appears to be that a change in economic circumstances, although not the fault of either party to a contract, will not constitute a *force majeure* event.[4] This is in line with the well-established law that such economic changes will not frustrate a contract.[5]

Some FMCs expressly exclude foreseeable events, and others may be interpreted as applying only to unforeseeable events, as with the cases interpreting 'act of God'. In such cases, the circumstances of the formation of the contract should be analysed to determine whether the Covid-19 crisis, or its impact on the performance of the contract in question, could reasonably have been foreseen by the parties. Where an event was inevitable, and the party seeking to rely on it was aware of facts that showed this at the time of the contract, they may not be allowed to rely on an FMC.[6] This may also give rise to an obligation at the time of contracting for a party to make reasonable inquiries to ascertain whether, absent unforeseen events, they will be able to comply with their obligations.[7]

Treitel notes that there is a tendency for the courts in England to construe FMCs narrowly against the party trying to rely on them, although he suggests that there is no rule to this effect.[8] There is a degree of overlap between FMCs, which traditionally limit the scope of a contractual duty (e.g., an obligation to sail "subject to weather"), and exclusion clauses, which exclude or limit liability for breaching an obligation, and are subject to special rules of interpretation.[9]

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A stricter approach is evident in some borderline cases.[10] Certainly the courts show a reluctance in the absence of clear language to adopt constructions that would allow a person to rely on circumstances within the control of one of the parties to the contract,[11] or circumstances that prevent one method of performance but not another,[12] as constituting a *force majeure* event. A party should make every reasonable effort to perform their obligations before falling back on an FMC.

Causation

The parties to an agreement can provide for obligations under the agreement to be varied on the occurrence of particular events without a need for a causal relationship between the events and the ability of either party to perform the contract, but typically an FMC will require causation. The use of words such as 'caused by', 'as a result of', 'prevented by', 'hindered by', or 'delayed by' signify that there must be some causal link between the *force majeure* event and difficulties in performing contractual obligations. This requirement to show causation has given rise to several difficulties.

The words used in an FMC dictate the degree of interruption required before the clause can be relied upon. A clause providing only for circumstances where performance has been 'prevented' imposes a high burden on a party seeking to rely on it to show that performance was not possible, whereas a clause that applies in the event that performance has been 'hindered' can be relied upon in the event of less serious interruption to performance. In each case, the words of the clause will have to be carefully examined in the prevailing circumstances to determine whether performance is excused. For example, a manufacturer that was permitted to stay open throughout the crisis,[13] but which had to substantially alter the layout of its production areas to comply with social distancing guidance leading to decreased productivity, might find it hard to argue that it was 'prevented' from complying with an obligation to produce goods, but would have a better case that the crisis 'hindered' or 'delayed' performance.

Where performance of a contractual obligation has been impacted by multiple causes, not all of which are *force majeure* events, it can be difficult to assess whether the *force majeure* event will excuse non-performance. Historically, reliance has been allowed on the clause in some cases without proving that the party relying on the FMC could otherwise have performed their obligations[14] while in others a 'but for' test was applied to prevent a party from relying on *force majeure* where they would not have been able to comply with their obligations, notwithstanding the *force majeure*.[15] Each judgment emphasised the particular language and circumstances of the relevant contract, but the recent cases suggest that the English courts may now be more inclined to adopt a 'but for' test. One exception suggested in England is in the case of 'contractual frustration' clauses, which bring the contract to a

complete end on the happening of certain events. By analogy with the rules for frustration, a 'but for' test might not be appropriate for such clauses.[16] In the context of Covid-19, businesses may be disrupted in different ways by regulations giving effect to the lockdown, changes to operations brought about by public health requirements, supply chain issues, and demand-side factors linked to the economic contraction accompanying the pandemic. In these circumstances, it is necessary to carefully analyse the factual circumstances to determine whether the only reasons for non-performance derive from defined *force majeure* events, and if not, the words of the contract will be crucial in determining whether the defaulting party can still rely on it.

Commonly, an FMC will require the party seeking to rely on it to give notice to the other party on the occurrence of a force majeure event. The requirements for notice to be given vary significantly between contracts, and may require significant detail to be provided.

Determining whether an FMC can be relied upon where a party is able to perform some but not all of its contracts with different parties often causes difficulties. It would clearly defeat the purpose of such clauses in many cases not to allow a supplier to rely on such a clause where an adverse event has limited its ability to meet its obligations, such that it could comply with its obligations to any one of its customers but not to all of them. On the other hand, if a supplier could escape its obligations under every contract in circumstances where the *force majeure* event prevented it from meeting some but not all of them, it could give a windfall to a supplier who could then choose the most profitable contracts to fulfil, or to escape all contractual obligations and sell the goods at an inflated market price if the *force majeure* event has led to a widespread fall in supply. Where supply constraints mean that it would be impossible for a party to fulfil all of its contractual obligations to its customers in the ordinary course of business, an FMC may excuse non-performance in respect of one customer, even though, if the supplier chose to, it could comply with its obligations to that customer by failing to comply with its other contracts.[17] By contrast, parties who have, by their own actions, failed to secure sufficient stock to meet their obligations,[18] or who only owe a moral (rather than a contractual) duty to a third party,[19] cannot normally rely on FMCs to escape their contractual obligations. In the context of Covid-19, the courts may well be sceptical of a party seeking to rely on global supply shortages to avoid its contractual obligations. Demonstrating that the party would not have been able to meet all its pre-existing contractual obligations as a result of the shortage, and that the clause was not relied upon in order to profit from price increases, may help to overcome any such scepticism.

Notice provisions

Commonly, an FMC will require the party seeking to rely on it to give notice to the other party on the occurrence of a *force majeure* event. The requirements for notice to be given vary significantly between contracts, and may require significant detail to be provided. Parties to contracts that may be affected by the crisis should familiarise themselves with the *force majeure* provisions in their agreements, and if events occur that the clause suggests should be notified, comply with the notification provisions.

Typically a party will not be entitled to rely on an FMC if they fail to comply with the notice provision.[20] If notice requirements are expressed to be a condition of the exercise of the FMC, or on the normal principles of interpretation of innominate terms[21] found to be one, strict compliance will be required before an FMC can be relied upon. If the notice provision is simply a warranty, a party who fails to comply strictly with it may still be able to rely on the FMC, but may be liable in damages for any loss caused by defects in the notice.[22] Whatever the status of the notice requirement, the other party may waive any defect in the notice, which will render it effective.

Effect of *force majeure* clause

The effect of an FMC on the obligations of parties to a contract is determined by the words used in the contract. In some clauses, non-performance may be completely excused; in others the intervening event suspends the obligation during the course of the intervening event, and may allow for discharge if the intervening event lasts beyond a specified length of time. Such clauses often include provisions for the full or partial repayment of sums already paid under the contract or the payment of expenses incurred prior to, or associated with, the *force majeure* event. The clause should be carefully considered to assess the effect of triggering it before it is invoked.

If a party is relying on an FMC to suspend performance of a contract, care should be taken to monitor the situation to determine when the *force majeure* event can be said to have ended so that performance of the contract may continue. The clause may require notice to be given before performance can continue. Given the rapidly changing circumstances, it would be prudent for any party relying on an FMC, especially where its use has been disputed, to keep a record of the factors triggering the FMC, including any changes over time, together with any evidence that may be available to support the claim, in case of litigation.

Alternatives

If the contract does not contain an FMC that covers difficulties encountered in performing a contract, the defaulting party may seek to fall back on the doctrine of frustration.[23] As a generally applicable doctrine, it does not have to be specifically provided for in the contract, but will be excluded if the contract provides for the circumstances alleged to give rise to frustration. The circumstances in which frustration will apply are extremely narrow,[24] but supervening illegality is a well-established basis for frustration,[25] so frustration may be relevant for contracts that could not have been performed without breaching regulations introduced in response to the Covid-19 crisis.[26]

Traditionally, if frustration could be established, all future obligations from the date of frustration are discharged and losses lie where they fell on that date.[27] In *Fibrosa Spolka Akcyjnia v Fairbairn Lawson Combe Barbour Ltd*, the House of Lords changed the position in England to allow for recovery of monies paid by way of a deposit where there was a total failure of consideration.[28] As of the time of writing, there is no Irish decision expressly considering whether to follow *Fibrosa* or to retain the traditional position, but a number of judgments implicitly support the availability of recovery of deposits following forfeiture in the event of a total failure of consideration.[29]

References

1. *Pandorf & Co v Hamilton, Fraser & Co* (1886) 17 Q.B.D. 670 at 675, overturned on appeal on an interpretation of a different part of the clause: (1887) 12 App Cas 518.
2. See *Halsbury's Laws of England* (5th ed., 2019 update), vol 22, para. 269.
3. E.g., *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp & Paper Co.* (1976) 56 DLR (3d) 409.
4. *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm).
5. E.g., *Zurich Bank v McConnon* [2011] IEHC 75.
6. *The Angelia* [1973] 1 WLR 210.
7. Ibid at 225.
8. Treitel. *Frustration and Force Majeure* (2nd ed.). Sweet & Maxwell, 2014, p. 476.
9. McDermott and McDermott. *Contract Law* (2nd ed.). Bloomsbury Professional, 2017, chapter 11.
10. E.g., *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2018] EWHC 2389 (Comm); [2019] EWCA Civ 1102.
11. E.g., *Fyffes Group Ltd v Reefer Express Lines Ltd* (The Kriti Rex) [1996] 2 Lloyd's Rep 171; *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2018] EWHC 2389 (Comm); [2019] EWCA Civ 1102.
12. E.g., *Warinco AG v Fritz Mauthner* [1978] 1 Lloyd's Rep 151.
13. See Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2020 (SI 121/2020), sch. 2, para. 2.
14. E.g., *Bremer Handelsgesellschaft GmbH v Vanden-Avenne Izegem PV BA* [1978] 2 Lloyd's Rep 109; *Continental Grain v STM Grain* [1979] 2 Lloyd's Rep 460.
15. E.g., *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm); *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2018] EWHC 2389 (Comm); [2019] EWCA Civ 1102.
16. *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2018] EWHC 2389 (Comm); [2019] EWCA Civ 1102.
17. *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495.
18. *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] A.C. 684.
19. *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep 304.
20. *Webprint Concepts Limited v Thomas Crosbie Printers Limited* [2013] IEHC 359, in the context of an application for security for costs.
21. See McDermott and McDermott. *Contract Law* (2nd ed.). Bloomsbury Professional, 2017, para 20.05 et seq.
22. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109
23. See generally McDermott and McDermott. *Contract Law* (2nd ed.). Bloomsbury Professional, 2017, chapter 21.
24. See *William Neville and Sons Ltd v Guardian Builders Ltd* [1995] 1 ILRM 1; *McGuill v Aer Lingus Teo* (Unreported, High Court, October 3, 1983); Collins v Gleeson [2011] IEHC 200.
25. E.g., *Dunne v Hamilton* [1982] ILRM 290; *Ross v Shaw* [1917] 2 IR 367.
26. Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020: SI 120/2020; SI 121/2020; SI 128/2020; SI 153/2020; SI 155/2020; SI 174/2020; SI 181/2020.
27. *Chandler v Webster* [1904] 1 KB 493.
28. *Fibrosa Spolka Akcyjnia v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.
29. *Vanguard Auto Finance Ltd v Browne* [2015] 1 ILRM 191; *HKR Middle East Architects Engineering LC v English* [2019] IEHC 306; *Ringsend Properties v Donatex* [2009] IEHC 568.

Our shared future

The Programme for Government contains a number of justice sector reforms but is silent on the issue of civil legal aid.

Conor Dignam SC

The new Programme for Government recognises that an independent, impartial and efficient judiciary and courts system is critical to our democracy and there are a number of welcome measures outlined therein, which seek to achieve a courts system that is more responsive to the needs of all users. The Covid pandemic has focused particular attention on the level of investment required for ICT and physical infrastructure.

Court reform, victim support, and hate crime

The Programme will enact a Family Court Bill to create a new dedicated Family Court. It will not be missed by many that the Family Court Bill has long been mooted. Its appearance on the legislative programme has been a constant through the years. Action must now follow commitment. The recent increase in the funding allocated to the long-awaited development of a Family Law and Children's Court at Hammond Lane is one step in the right direction.

The role of the courts in our climate action response is evidenced by a commitment to establish a new Planning and Environmental Law Court, managed by specialist judges and on the same basis as the existing Commercial Court model. We are likely to see increased litigation in this area and the Government recognises that there is a need for greater specialism in areas such as planning law to enable the more efficient management of cases.

The Programme commits to acting on the findings of the O'Malley Review (yet to be published), which is examining the adequacy of current arrangements for the protection of vulnerable witnesses in the investigation and prosecution of sexual offences.

The need to enhance the supports provided to those who give evidence in criminal trials was stressed by The Bar of Ireland in its submission to the Review Group in 2019, provided such measures are balanced with the need to ensure the constitutional right to a fair trial of the accused.

Those who seek to encourage and incite others to hate minority groups will be prosecuted under a revised and updated Incitement to Hatred Act 1989. The Bar of Ireland made submissions to the Department of Justice as part of a public consultation on the legislation and in doing so identified fundamental weaknesses in the Act, which limit its overall effectiveness. A number of amendments were proposed.

Civil and criminal justice

A commitment to improving access to justice and achieving a more economical use of court and judicial resources will be informed by the final report of the Administration of Civil Justice Review Group, chaired by Mr Justice Peter Kelly. We await the final publication but anticipate leaner and more efficient administration of court processes while ensuring that access to justice, and the experience of the administration of justice, is by no means diluted or minimised.

The call for an examination of a dedicated system of public defenders arises once more in the context of criminal justice. Past reviews of the public defender model concluded not only the cost to be prohibitive, but that the independence of legal representation would be brought into question. As recognised by the former government's 2018 Spending Review, the current system represents greater flexibility in terms of client choice and better value for money for the taxpayer through the provision of low-cost high-quality representation by an independent referral bar of sole practitioners.Such considerations will no doubt bear significance in any future investigation of the model.

Brexit, personal injuries guidelines and the justice gap

The Government will continue to work with all sectors to ensure that Ireland is Brexit ready. The Bar of Ireland looks forward to participating in future actions, in particular under the Ireland for Law initiative. The Legal Services Implementation Group, chaired by former Taoiseach John Bruton, will likely see increased activity in order to promote Ireland globally for international legal services.

Proposals to amend the Constitution, which would enable the Oireachtas to establish guidelines on award levels in personal injury actions are included in the programme. No doubt these proposals will heed the advice of the Law Reform Commission, which is currently examining whether it would be constitutionally permissible, or otherwise desirable, to provide for a statutory cap on damages. The Bar of Ireland has submitted that the balance between providing more certainty in awards of damages, yet retaining judicial discretion, is best achieved through the already established Personal Injuries Guidelines Committee, whose work should be allowed to take its course before other more radical models are considered. An issue as complex and multifactorial as insurance requires a multifaceted approach; therefore, provisions of the Programme that commit to tackling fraud and anti-competitive behaviour are of equal importance.

The Programme is notably silent on civil legal aid. This represents a major shortcoming given the demands on the scheme, which are anticipated to increase even further in light of Covid and any resulting recession. The 'business case' for facilitating access to justice through the provision of an efficient, adequately resourced legal aid service is that it maximises positive outcomes for clients and decreases cycles of disadvantage, while alleviating pressures on other areas of public expenditure and contributing to the wider economy. Failure to recognise this is a missed opportunity.

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Those saving for retirement normally have the advantage of a longer-term investment horizon and staying the course should provide the best opportunity for their investments to recover and increase in value.

Short-term decisions are inappropriate for long-term investments – in stormy times those investors who hold their course fare better when markets recover.

Contact your JLT Bar of Ireland pension team, Donal Coyne (01 636 2746), Grainne McEvoy (01 636 2744), Nicola Walshe (01 636 2727) or via email at dcoyne@jlt.ie

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