THE BAR
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THE BAR OF IRELAND
The Law Library

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Back to the future: PPOs and *Hegarty v HSE*

NEW EDITION

The Law of Evidence in Ireland

By Caroline Fennell

Now in its fourth edition, *The Law of Evidence in Ireland* is an important text for all working in the Irish legal system, the criminal legal system in particular, as well as policy makers and those studying more general issues related to matters of trial, adjudication and fact-finding in various contexts.

This new edition covers a number of key topics including:

- Judicial consideration of fairness in the pre-trial process in light of a changing societal context and delivery on the accused's right to fair trial, as reflected in analysis of Supreme Court decisions such as *JC and Dwyer*
- The developing concept of transnational fairness in facing the challenge of co-operation in combating crime and instruments such as the European Arrest Warrant reflected in cases such as *Celmer*
- Changing approaches of Irish courts to traditional rules including those relating to expert witness testimony, evidence of bad character and prior misconduct, as well as assertions of new headings of privilege

In addition this title explores the phenomenon of the Special Criminal Court and the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 is also considered in detail.

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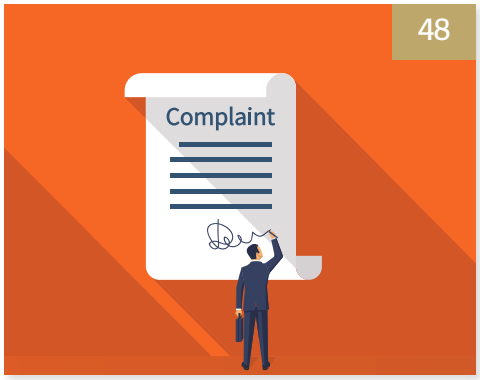

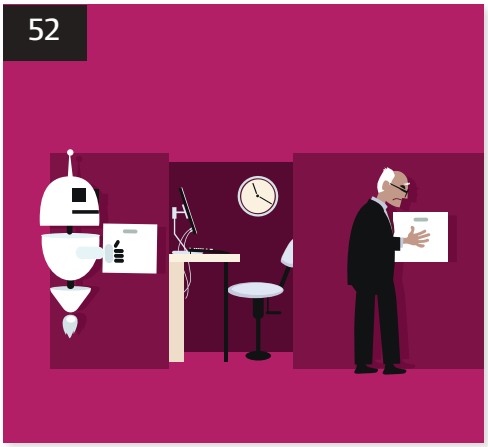

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Justice must continue

As members struggle to deal with the impact of the Covid-19 crisis, the importance of collegiality has never been more evident.

An Taoiseach Leo Varadkar has addressed the nation on three occasions since St Patrick's Day – that now seems like a lifetime ago. Normal freedoms have been suspended. Difficult times lie ahead. We all have an important role to play in the societal effort to tackle this national and global emergency. As cases and fatalities continue to rise in Ireland, basic decency necessitates that we all comply with the official guidelines and with the advice of the public health experts. The message is clear – stay at home, maintain social distancing and self-isolate should you experience any symptoms.

The Council is acutely aware of the challenges that members face on different fronts due to the current situation. For most members, income streams have been turned off like a tap. The Council has been meeting weekly to discuss our approach to supporting members during this unprecedented crisis. The Chief Executive and I are liaising and meeting regularly throughout the course of each day and night, and Council members have been liaising with each other and with the membership generally to gather feedback and to highlight issues of concern. I am immensely grateful to Council members and to the Executive for their tireless work and support. We continue to invite members to provide feedback to help inform the work of the Council during this extraordinary time.

Court sittings

During the course of the last few weeks, the Council made representations, as appropriate, on matters that were arising for members in carrying out their professional duties before the courts. We greatly appreciate the work of the judiciary and the Courts Service over the past number of weeks in dealing with the concerns of members and other court users, while also ensuring that the administration of justice proceeds to the greatest extent possible.

Remote hearings

The Council has made a detailed submission to the Chief Justice to indicate our support for the introduction of remote hearings so that some reasonable measure of court work can continue during this period. We must find ways for the administration of justice to continue in this crisis. A remote hearing conducted by technology is no substitute for an oral hearing with counsel and clients present. However, in this emergency, our courts and the profession cannot stand frozen. Access to a functioning court system is the bedrock of our democracy.

Business of the Council and committees

Despite the disruption, work continues across key projects. Shaping the future of CPD – an internal review of our CPD offering and structures – is currently underway. Members are invited to share their views and experience of the current CPD Scheme to help inform improvements. Full details on how to participate in the review can be found in *In Brief* and the Education and Training Bulletin.

A public consultation by the Legal Services Regulatory Authority (LSRA) on the unification of the solicitors' and barristers' professions is underway and the Council is in the process of preparing a submission. Members are invited to submit any observations they may have. I would like to express my gratitude to all who participated in and assisted with our inaugural Justice Week in February. The campaign was a huge success and would not have been possible without the generous contribution of our members' time and effort, including that of members of the judiciary. It is intended that Justice Week will form part of the legal and justice sector's annual calendar of events and we look forward to the involvement of many more voices in 2021.

This year marked the fifth annual dinner hosted by The Bar of Ireland to celebrate women in law as part of International Women's Day. The unveiling of a portrait of Ms Justice Mary Laffoy by the award-winning artist Hetty Lawlor made this year's celebrations all the more special. The portrait will be on permanent display on the walls of the King's Inns in honour of Justice Laffoy's extraordinary contribution to the legal profession and to the law.

Mental health and well-being

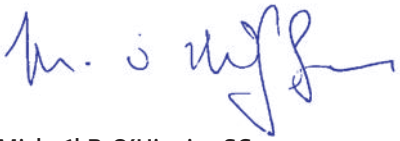
It is more important than ever that we look after our collective mental health and well-being, as well as our physical health. It is hard not to feel isolated and stressed during this difficult time. Please be reminded of our Consult a Colleague Helpline and the range of external supports that are available via www.yourmentalhealth.ie.

As we adapt to new ways of working, it is important that we try to restore normal routines of daily living. This is easier said than done. This is a time when the collegiality of the Bar is an immense resource and I ask you to check in on colleagues and support one another through this as best we can. The Council is giving active consideration to how it can support members during this challenging time in the short, medium and long term, and further updates will issue in this regard.

I would like to take the opportunity once again to thank members of the Council, the Executive and the wider membership for their support and understanding as we navigate these unprecedented times. Please be assured that we will continue to support all members as best we can. Let's stay positive and play our part.

In Thomas Kinsella's memorable but brutal phrase, when we eventually come through this and can look back in time at this awful period, hopefully we will be "Hacked clean for better bearing".

Wishing you and your family members good health.



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

Business as usual

Despite the current crisis, our efforts continue to report on and analyse relevant legal issues and cases.

These are tumultuous times. The focus of all our lives has dwindled to the key essentials of keeping each other safe and surviving this crisis. But this isolation will end. And in the interim, we aim to keep you up to date with all the recent developments in law and practice.

The Legal Services Regulatory Authority has now commenced investigating complaints against legal practitioners in relation to inadequate services, excessive costs, and misconduct. Happily, at this early stage, it appears that there have been very few complaints against barristers. However, one feature that cuts across almost all complaints is a lack of communication, where a legal practitioner fails to properly respond and adequately explain issues to clients. We analyse how the new regulatory regime will operate in practice, including the provisions relating to informal resolution/mediation.

The new Chief Executive of the Courts Service is no stranger to members, given her years of experience as Deputy Master and Registrar in the High Court. In this edition, Angela Denning sets out the strategy to modernise the Courts Service and improve access to justice for all.

The recent Work Relations Commission decision in *Anne Roper v RTÉ* has again highlighted the difficulties and uncertainties surrounding compulsory retirement ages. Our author describes the balancing act that employers must engage in when dealing with employees nearing retirement.

And finally, we return to the vexed issue of periodic payment orders, or PPOs, for plaintiffs who receive damages for catastrophic injuries. Given the recent High Court decision in *Hegarty v HSE*, it appears a PPO will rarely, if ever, be appropriate to meet a plaintiff's needs, given the current indexation provisions prescribed by the legislation. Clearly, a legislative rethink is required.

Best wishes to all our members and their families at this difficult time.

Eilis Brennan SC
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PELGBA Conference

The Planning, Environmental and Local Government Bar Association (PELGBA) held its inaugural conference in the Dublin Dispute Resolution Centre (DDRC) on Saturday, February 29. The Conference was chaired by Mr Justice Brian Murray, Judge of the Court of Appeal. Nuala Butler SC opened the conference and discussed reasons for planning decisions. This was followed by Eamonn Galligan SC speaking on the topic of judicial review, Dermot Flanagan SC discussing recent developments in compulsory purchase law and possible reform, and Stephen Dodd SC, on recent developments in local authority law, such as: housing; the vacant site levy; rates/valuation; and, other matters.

The afternoon panel consisted of Tom Flynn BL, on key recent developments in environmental law, and Suzanne Murray BL, on recent developments in enforcement and Section 5. The PELGBA is a specialist association for barristers who practise in or have an interest in planning, environmental and local government law in Ireland. For more information about upcoming events or to join the association, please go to www.pelgba.ie.

Barrister named Sailor of the Year

Congratulations to Paul O'Higgins SC, who was given Irish Sailing's Sailor of the Year award for his two-in-a-row win of the Volvo Dún Laoghaire to Dingle race. Racing his JPK 1080, *Rockabill VI*, he showed consistent form, with a series of wins throughout the year, including at the Irish Cruiser Racing Association (ICRA) National Championships in June, Calves Week in August, and the Irish Sea Offshore Racing Association (ISORA) title in September. The Sailor of the Year award is given by Irish Sailing in association with *Afloat* magazine.

International Women's Day 2020

A portrait of Ms Justice Mary Laffoy by the award-winning artist Hetty Lawlor was unveiled as part of The Bar of Ireland's International Women's Day celebrations on March 5, 2020. The portrait, which was commissioned by The Bar of Ireland in honour of Justice Laffoy's extraordinary contribution to the legal profession, will be on permanent display on the walls of the King's Inns. The portrait, which took just over two months to complete, is the third portrait of a female judge to hang on the walls of the King's Inns, joining the portraits of Susan Denham and Mella Carroll. This year marked the fifth annual dinner hosted by The Bar of Ireland to celebrate women in law as part of International Women's Day.

An esteemed audience of barristers, judges, solicitors and State officials gathered in the King's Inns dining hall to celebrate their female colleagues. Attendees were given a warm welcome by Chair of the Equality, Diversity and Inclusion Committee, Moira Flahive BL, who underlined the importance of gender equality in the legal professions and called on those who brief the Bar to make a conscious effort to look beyond their usual pool of barristers and to assist in the equitable distribution of briefing to both male and female counsel in all areas of practice. Ms Flahive then delightedly unveiled Justice Laffoy's portrait, with the help of artist Hetty Lawlor and Ms Justice Laffoy, to rapturous applause and a standing ovation.

From left: Ms Justice Mary Laffoy; Grainne Larkin BL, member of the Equality, Diversity and Inclusion Committee of The Bar of Ireland; and, Hetty Lawlor, artist.

Following the dinner, Justice Laffoy addressed guests on the issue of gender equality in legal practice and wider society. Expressing her support and optimism for the work of the Citizens' Assembly, Justice Laffoy called for a collective response to the issue of gender equality, inviting the guests at the event to be "each for equal". In response to her portrait, Justice Laffoy said that she was honoured to have it join those of others on the walls of the King's Inns, and especially honoured that it is the creation of such a talented, young female artist as Hetty Lawlor.

Justice Week 2020

In February, The Bar of Ireland held its inaugural Justice Week – a joint awareness campaign of the legal professions across the four jurisdictions (Scotland, Northern Ireland, Ireland, and England and Wales). The campaign was first initiated by the Bar Council of England and Wales in 2018, and 2020 is the first year that all four jurisdictions took part in a joint effort to boost the profile of justice and the rule of law.

The focus of the 2020 campaign was to engage with young people (the under 25s) through a series of events and social media to inform, educate and improve their understanding of the importance of the justice system, and to demonstrate the possibilities that the law can provide in protecting their fundamental rights and freedoms. Each day of the week carried a distinct theme, which reflected many of the common challenges facing citizens and states across Europe and beyond, such as: climate justice; the protection of fundamental rights and freedoms; and, access to justice. Bringing attention to the importance of law and the courts in addressing these challenges is an important and continuous exercise and The Bar of Ireland was delighted to see such a fantastic level of response and engagement across the wider legal and justice community, and particularly among our younger citizens, throughout the week.

Among the initiatives organised and hosted by The Bar of Ireland was a mock trial between the students of St Audoen's National School in Green Street Courthouse, an inter-university debate involving law students from UCC, DCU, NUIG, UCD, UL and MU, and a survey of the 100 participants of The Bar of Ireland's Look into Law Transition Year programme, which assessed their understanding of, and attitudes towards, the justice system.

Pictured are the winners of the inter-university Justice Week debate, who successfully argued for the proposition 'This house believes that law is politics by other means' before a prestigious panel of judges (from left): Jason Herbert, UCC; Ciara Ramsbottom, DCU; Simeon Burke, NUIG; Mr Justice Brian Murray; Órla O'Donnell, Legal Affairs Correspondent, RTÉ; Ms Justice Aileen Donnelly; and, Micheál P. O'Higgins SC, Chairman, Council of The Bar of Ireland.

The Bar of Ireland also took the opportunity to highlight and to communicate key policy priorities impacting on the justice sector, and reiterated its call on the next government to prioritise investment in legal aid and to commit the necessary resources to develop a dedicated family law and children's court at Hammond Lane. The Bar of Ireland would like to thank everyone who participated and assisted with Justice Week 2020. The campaign was a huge success and would not have been possible without the generous contribution of our members' time and effort, and that of members of the judiciary.

The Bar of Ireland would like to see Justice Week form part of the legal and justice sector's annual calendar of events, and looks forward to the involvement of many more voices in 2021.

Cyber insurance for barristers

Aon states that the legal profession is a target for cyber criminals with motives of financial gain via theft of confidential information or funds. According to the insurer, cyber risk affects us all due to our reliance on technology, connectivity, and automated processes.

In an increasingly punitive legal and regulatory environment, Aon states some professionals are taking proactive steps to explore and transfer their cyber risk.

Many factors contribute to barrister's cyber risk profile, including: action by employees; system/programme errors; security measures; nature and quantity of data collected; political or strategic significance; and, reliance on technology. Cyber risks considerations for legal professionals:

- theft and potential release of personally identifiable or corporate confidential information in your care;
- malware/incident preventing access to your network or systems or those of outsourced service providers;
- insider access;
- intentional acts committed by rogue employees; and,
- ransomware attacks.

Aon provides cyber risk insurance for barristers.

Members' area – Covid-19 section

A dedicated section of the members' area of the Law Library website – www.lawlibrary.ie – has been developed as a single point of contact for Covid-19 preparations and developments. Included are a number of resources that members may find useful in the context of working remotely, as well as links to other justice sector agencies. The site will be expanded and improved upon as the situation develops, and members' suggestions are welcome at: communications@lawlibrary.ie.

Stay the course

Considerations for retirement savers in the wake of the Covid-19 crisis from Donal Coyne, Director of Pensions at JLT, which operates The Bar of Ireland Retirement Trust Scheme.

The Covid-19 pandemic has wreaked devastation all over the world, with the number of fatalities in the tens of thousands and total confirmed infections fast approaching one million. Lockdowns have become common and in Ireland, all but our most essential workers are under order by the Government to stay at home. The global economy has experienced a severe shock with extreme volatility in financial markets. The worst element of the pandemic is its impact on the health of the most vulnerable in our society; however, it is also causing many to worry about their financial security in retirement.

Implications for retirement savers

Unless you are reasonably close to retirement, your retirement savings should be considered a long-term investment. Investment markets are very difficult to predict over the short term. Selling growth assets after they have fallen limits your ability to recover any losses in future. So if you get these decisions wrong, you can materially affect the size of your retirement savings and your future financial security. As a result, changing long-term investment choices in response to short-term market events is generally not advisable.

Instead, you should make sure that your investment choices are appropriate given your risk preferences, your circumstances, your objectives, and your time to retirement. For example, you may wish to invest depending on how far you are from retirement. This might involve investing in growth-oriented funds when far from retirement, with the aim of growing your retirement savings. Then making a progressive move into funds that match how you expect to take your benefits at retirement, over the last c. 7-10 years before retirement.

The funds expected to provide the highest return over the long term are also likely to have the highest level of ups and downs in returns, or volatility, over the short term.

If you are far from retirement, short-term market volatility will not be welcome, but you will likely have sufficient time to weather these short-term market fluctuations and recover value. However, switching to low-risk/return funds in response to short-term losses may lock in the reduced value of your retirement savings.

When to take advice

If you are closer to retirement, typically within c. 7-10 years, the effect of these swings is more problematic as there may not be sufficient time for your savings to recover before retirement. It is considered best practice for pension plan investors to move their retirement savings gradually towards investments that match the type of benefits they expect to take at retirement, in or around the last 7-10 years before retirement. Anyone approaching retirement should therefore consider taking financial advice on the options available to them, to ensure their investments match their risk profile and preferences.

These unprecedented times are a concern for all investors and markets are likely to continue to experience volatility. Those saving for retirement 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.

EUBA and ISEL event

A joint EU Bar Association (EUBA) and Irish Society for European Law (ISEL) event took place in the Gaffney Room on Wednesday, January 29. The theme of the event was 'Litigation Funding and Class Actions – An International Perspective', and it was chaired by Mr Justice Frank Clarke, Chief Justice. The event served as the formal launch of a joint report prepared by the EUBA and ISEL, in relation to litigation funding and class actions. Speakers travelled internationally to participate and included: Meghan Summers, Partner, Kirby McInerney, New York; Susan Dunne, Co-Founder, Harbour Litigation Funding, London; and, Dr Alex Petrasincu, Partner, Hausfeld, Berlin and Düsseldorf. Each speaker discussed the systems operating in their jurisdictions. The full report is available to download in the European Law events section on the ISEL website: www.isel.ie.

Gender equality submission

A submission, prepared jointly by the Council of The Bar of Ireland and the Employment Bar Association, was made in response to the Citizens' Assembly's Public Consultation on Gender Equality. The submission recommends a series of actions to address gender inequality in the areas of pay, recruitment/promotion, workplace structures, and caring responsibilities, and can be viewed on the Law Library website – www.lawlibrary.ie.

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Access to justice for all

In an interview that took place before the worst of the Covid-19 crisis was upon us, CEO of the Courts Service Angela Denning told *The Bar Review* about the plans to modernise and develop the Service for all users.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

As a relatively newly appointed CEO (since September 2019) with a massive agenda of reform to pursue, Angela Denning is already very busy, but on the day of our interview in early March, we are also hearing rumours of impending shutdown of services as a result of the Covid-19 crisis (of which more later). Angela is philosophical in the face of the coming challenges: "As the former President of the High Court told me many years ago, hold your nerve. Everything will work out".

Angela has spent most of her career with the Courts Service (see panel), apart from a brief period with An Garda Síochána, and a year in the Government Reform Unit at the Department of Public Expenditure and Reform. This period away from the courts was extremely useful in preparing her for the reform programme she is now leading: "I worked on a wide mix of legislation and projects that supported transparent government: whistle-blowing, lobbying, ethics, data sharing, open data, and freedom of information. I was also part of the Government reform team, including the Civil Service Renewal Plan and Public Service 2020".

She felt she brought particular skills to the role as well: "I think we're very lucky in the courts that we work directly with our citizens and with court users every day, so we get that instant feedback that other Government departments don't get".

Angela now brings all of that experience to her current role: "I think it's important for the leader of any organisation to have a good grasp of the work. I have built relationships with staff, with the members of the judiciary. I don't just see the Courts Service perspective, I see the broader cross-justice perspective as well".

A decade of reform

That ability to work with what she calls "our sister justice agencies" is all the more vital as the Courts Service begins its ten-year reform programme, which will encompass every element of how the Service operates: "The Courts Service is not

Minding yourself

In her spare time, Angela loves to spend time on her allotment: "Somebody said to me, 'When things get bad, what do you do?' And I said, 'I go and I dig'". She also does hot yoga, and enjoys reading. She walks and cycles to work, which she says is great for her mental health: "I'm conscious that I can't look after my staff, and all the rest of it, unless I look after myself". She tries to pass that message on to staff too: "We've tried to bring well-being initiatives into work, like lunchtime pilates, meditation, and lunchtime walks. People need to see that it's okay to do this, and that we consider it to be part of your job to keep yourself well. I want this to be a place that people look forward to coming to work in. I would like my staff to be motivated and content, and to enjoy their jobs. And I think part of that is me letting them know that I care about them. At times, our staff work in very, very difficult situations, and we have a responsibility to look after them".

an island. We don't work in isolation from practitioners, from other agencies, from wider Government, or from our citizens".

So why is reform needed? Angela sees it as a reflection of changes in society generally, which have resulted, quite rightly, in an expectation that services will operate differently: "Much of court processes and procedures were designed for a particular time, but time has moved on, technology has moved on, and people have moved on. Practitioners have moved on too; there isn't a law firm in the country that doesn't use technology to assist them in how they do their work".

At a very basic level, it means doing away with outdated and cumbersome processes, to make things "easier, quicker and cheaper". Angela talks about the "quick wins" that will show people that change is happening, such as facilitating card payments, and reducing paper-based business. Making older court buildings fit for purpose will also form part of the plan. But for this kind of root and branch reform, a tremendous amount of foundation work has to be done, and that's the stage the Service is at right now: "We're trying to build our capability and capacity in IT, and in our change programme office. We've advertised for a head of communications. We've established a sustainability unit and are establishing a procurement unit. These are all things that I think a modern organisation needs in order to be able to deliver the large-scale change that we're looking at".

Angela is obviously hugely enthusiastic about this programme, and our interview is filled with examples of inefficiencies that need to be addressed, and improvements that have already been made: "We've centralised our jury summons in Castlebar and that has given us financial savings. When somebody gets a jury summons now – we send out 120,000 a year – and they lift the phone, they get somebody who can answer their query. The question is: why do they need to lift the phone? Why do they need to post their summons back? So we're currently looking at an online platform for jurors".

"I think it's safe to say that our civil and family law IT systems are on their knees, so they will be our priorities in the first three to five years. If we don't have capacity and capability, no amount of money will deliver what we need".

Priorities

As the foundation building continues, what are the priorities? Upscaling IT is clearly top of the agenda, and is where resources and funding will be concentrated in the early years: "I think it's safe to say that our civil and family law IT systems are on their knees, so they will be our priorities in the first three to five years. If we don't have capacity and capability, no amount of money will deliver what we need".

Money is of course an issue. Angela's team is working on a strategic business case to try to secure funding for the first three years of the programme to start with, and then for the longer term.

The task then is to deliver promptly on the first small projects, so that stakeholders can see what can be achieved: "It's about getting people used to the idea that the Courts Service is not going to stand still. The steps we're taking at the moment are steps along the way and I hope that people will see that incremental improvement as the years move on".

Angela is delighted to have the support of the judiciary and the professions in this endeavour: "For the first time, we now have a Modernisation Committee of the Courts Service Board, chaired by the Chief Justice. This is very much being led by the Chief Justice. That partnership approach is the only way this will work. It's about us all working together to deliver improvements across the system".

Many suggestions for efficiencies come from staff within the organisation, and Angela is delighted to encourage this: "The newer staff who've joined us in recent years are absolutely fantastic because they haven't been indoctrinated in the way we do things around here. They see the possibilities".

One of these ideas is a fantastic new approach to staff training, which will also increase efficiencies in rolling out other innovations: "We've had a huge number of staff retire, so we're rebuilding our training. All of our staff have told us that the most frightening part is not the knowledge, it's the first day in the courtroom, and somebody said, can we not get virtual reality goggles to do that? So what we've done in this building is build a model court, and we're going to use that to test all of our IT, including the different types of technology that registrars will use, to see whether things work".

Angela is keenly aware that simply digitising everything is not the solution: "If the processes are cumbersome, and you digitise them, it will not give us the efficiency that will be required".

Family law is also high on the agenda: "Hammond Lane is a real priority. We need to build something that will suit the demographic projections. It's an entirely different building to the ones we have built already. We don't need cells, separate entrances for prisoners, suites for An Garda Síochána and the prison service. We'll need facilities for the Legal Aid Board, for mediation services, NGOs. We'll need those types of supports in the building to encourage people, first of all, to mediate, and then to make that court journey easier".

The system needs to work for citizens as well as staff. This 'customer focus' is something Angela has spoken about several times since her appointment, and it's something that's particularly important to her, and to the Service's partner agencies: "It's about enabling access to justice for everyone. We're very lucky at the moment that there's an alignment between justice agencies, and with wider social partners as well, such as NGOs, to improve things for the people who live in this country".

The bigger picture

The reform process is also about the Courts Service's wider contribution to economic stability: "The Bar has the Ireland for Law initiative. We'd like to be able to do our part to support that. We need to prove the Wi-Fi in courtrooms, Wi-Fi access for practitioners. E-licensing is another very good example of where we're using technology to try to ensure that solicitors don't have to come to court more than the one time that they do need to come. Our court processes are not technologically enabled. You have to come and file papers in our offices or post them in. That's something we really need to look at. Economic growth needs stability. We have legal stability in this country in that our judiciary is highly regarded. That's a huge strength. If we can introduce things that improve the timeliness of access to justice, that's really important".

This also extends to the elements of the strategy that involve using the Courts Service's buildings better, including moving some services away from Dublin to rural towns in need of regeneration: "The centralisation of jury summonses and the service of foreign documents in Castlebar really shone a light for me on how we can improve our organisational structures, but also what we can deliver for rural towns. I'm very conscious that in the current market, accommodation is expensive for our lower-paid staff in the Dublin region, and I need to take that into consideration. We will have an estate strategy by the end of the year for our courthouse buildings, which will determine which buildings are upgraded. There will be some courthouse closures, because the current estate is very scattered. It's costly to maintain, and I can't provide the type of facilities I'm talking about – video conferencing facilities – in every courthouse in Ireland. We'll do that in a planned way, taking account of demographics and public services".

Changes will be also audited to make sure they work for users: "We hired consultants to speak to users of the e-licensing system to get their feedback, to see what improvements we need to make, and what we could have done better, because that's the first time we've really engaged directly with practitioners. To me, it's a test case to see how that engagement works, and where we come across pinch points, where we need to do things better, and what the blockers are for practitioners. There's no point in us putting in a system if people can't use it because we haven't considered something at design stage. It might slow things down, but if you engage at an earlier stage, you get a better outcome".

Trust

With the focus on customer service, and on including all stakeholders in this process, the issue of trust is critical. In particular, for members of the public in these sceptical times, trusting a system that proposes to allow online guilty pleas for minor offences, or large-scale digital processing and exchange of information, is a big ask. Angela is very aware of this, and putting systems in place to ensure that this trust is not misplaced is central to the whole reform process: "You have to be open and transparent. You have to use people's data well and safely. Our citizens are concerned about how Government uses their data. Government does use their data very well and is very cautious about using their data, but there's a perception out there that somehow we'll misuse it, and I think of all organisations, the Courts Service needs to be really alive to that. GDPR training has been rolled out here and there's been a huge take-up".

Public servant

Angela joined the civil service in 1995 and was assigned to the courts, working on the public counter in the central office for the first seven years, before moving to probate. She was Registrar to the Master of the High Court, and served as Non-Jury/Judicial Review Registrar for a decade. A particularly proud moment was a move back to the central office, where she had begun her career, but as office manager. A short period with An Garda Síochána followed, before promotion to the Department of Public Expenditure and Reform, where she spent a year in the Government Reform Unit before taking up her current role.

Coronavirus

Even before the Covid-19 crisis had truly taken hold, Angela's office was dealing with the implications of new government formation, and the fact that there are no guarantees in terms of how funding or supports will be rolled out. The current unprecedented situation only serves to bring that home even more: "Covid-19 has taught us how quickly priorities can change. Commitments to fund things are all well and good, but if this creates a global downturn, that will impact funding, and we, like every other public service organisation, will have to cut our cloth to suit our measure".

The first closures of schools and businesses were still days away at the time of our interview, but Angela and her staff were making preparations for what subsequently came to pass: "We have a bi-weekly meeting of senior staff. We have plans in place. We will continue to provide court services and court hearings. We are guided by the HSE, so at whatever point we're told to scale back hearings and so on we have a plan in place as to what the priorities are, what services need to continue to be supported, and we'll divert our resources accordingly".

The crisis will also give the Service the opportunity to further test some of its IT upgrades: "We've scaled up virtual meeting rooms, to allow our senior managers to continue business and to continue to plan. We foresee that in coming weeks we will have to continue to provide court services, but not necessarily in the way we do now. I think that, for example, prisons are very vulnerable. And I would foresee that videoconferencing to prisons will be the norm rather than at the moment, where it's optional".

The service also upgraded its capacity for staff to work from home, doubling it in the space of two weeks so that up to 450 judges and staff can do so if necessary.

Despite the very real concerns, Angela remains optimistic: "We've learned a lot from the red weather alerts in recent years. We've dealt with other crises. We're adaptable and we're good at that. With a shutdown, for example, for however long it might be, we look at the impact of that on the economy, and the consequential impact on the ability to deliver services. We may have to scale back our plans. But I would hope that any dip would be a short-term one and that over the course of the 10-year plan we'll be able to deliver".

Back to the future: PPOs and *Hegarty v HSE*

A recent judgment questions whether, given the current indexation provisions, a periodic payment order could ever be appropriate to meet a plaintiff's needs.

Alan Keating BL

Introduction

The author has written two articles, published in *The Bar Review*, on the topic of periodic payment orders (PPOs). The first article outlined developments leading to the publication of the report of the Working Group on Medical Negligence and Periodic Payments (the 'Working Group Report')[1] prior to the introduction of a legislative regime in this jurisdiction. The second article provided an appraisal of the provisions of the Civil Liability (Amendment) Act, 2017 ('CLA 2017') (inserting a new Part IVB into the Civil Liability Act, 1961 ('CLA 1961')) constituting that legislative regime.[2] A composite paper was also prepared and delivered at a Bar of Ireland CPD conference on April 23, 2018.[3]

Since then, Part IVB of CLA 1961 was commenced[4] and Order 1A of the Rules of the Superior Courts was amended by S.I. no 430 of 2018: Rules of the Superior Courts (Personal Injuries: Periodic Payment Orders) 2018 ('the PPO Rules'). The purpose of this article, however, is to analyse the decision of Murphy J. in *Hegarty (a minor) v HSE* [2019] IEHC 788 ('*Hegarty*'). The judgment questions whether a PPO will ever be appropriate to meet a plaintiff's needs, given the current indexation provisions provided for in s. 51L CLA 1961 (the harmonised index of consumer prices – HICP). This warrants some further development of the views expressed in the second article[5] and the completion of a trilogy.

Lump sum awards and interim lump sum awards

Murphy J.'s decision in Hegarty provides a useful exposition of the common law position in relation to damages,[6] summarising that position as follows:

(i) a plaintiff who suffers catastrophic injuries is entitled to be compensated to the extent of 100% for the loss and damage occasioned by the tortious wrong done to them;

(ii) damages are paid by way of a once-off lump sum award calculated by reference to the plaintiff's lifetime needs established as a matter of probability;

(iii) where there is real uncertainty as to the nature and cost of a plaintiff's future needs, the court has an inherent jurisdiction to adjourn the consideration of a plaintiff's future needs and to make an interim award covering the plaintiff's established needs for the adjourned period – the interim award is a lump sum award based on the plaintiff's actual needs for the adjourned period, and can include payment of other ascertained items, such as losses already incurred, and a sum for general damages; and,

(iv) finally, the court notes that in this case and in others, payments on account have been approved and made – these differ from an interim payment in that they do not finally determine the damages due for a specific period, but are rather a down payment against the ultimate liability, when ascertained; these payments on account appear to the court to be within its common law jurisdiction on the same basis that interim payments have been held to be.[7]

Interim lump sum payments developed in practice, by consent of the parties, in the period pending implementation of the Working Group Report recommendations; they allowed plaintiffs to suspend resolution of life-long needs, thereby providing an opportunity to avail of PPO legislation, if favourable. In a series of cases, the High Court expressed confidence that there existed inherent jurisdiction to adjourn any aspect of a hearing if necessary to do justice between the parties, subject, if necessary, to the grant of an interim award.[8] In *Miley (a minor) v Birthistle* [2016] IEHC 196, Barr J. identified a rule of court – Order 36, r. 4 RSC – as permitting the Court, even in the absence of agreement between the parties, to adjourn a hearing in exceptional circumstances on condition that the defendant pay an interim award of damages covering established care needs in the interim period. Murphy J. concluded, in *Hegarty*, that this common law position was not displaced by Part

IVB CLA 1961; rather, the PPO introduced by legislation provides an additional option to the courts.[9]

The background to *Hegarty* and the issues addressed

The plaintiff, born on December 10, 2014, was a minor and ward of court. He had suffered catastrophic birth-related injuries due to the defendant's wrongdoing leading to cerebral palsy. The defendant admitted liability in May 2016 and, at hearing on October 25, 2016, an interim settlement, pending enactment and commencement of a statutory PPO regime, was agreed and ruled. The interim settlement covered general damages, past special damages and future special damages for the interim period, which interim period was to determine on October 22, 2019. As demonstrated, this was the typical course for catastrophic clinical negligence cases of this nature in the period between the publication of the Working Group Report and the commencement of CLA 2017. The plaintiff was taken into wardship on December 7, 2016. The plaintiff's future needs included care, assistive technology, and aids, appliances and equipment.

In the interim, CLA 2017 was enacted (November 30, 2017) and commenced (October 1, 2018), and the PPO Rules were promulgated (October 1, 2018).

It is a point of some importance that the plaintiff in Hegarty expressed a preference not for a lump sum award or a PPO, but for a further interim arrangement; the plaintiff's medical experts expressed the unanimous view that it was too early in his development to predict his needs for the purposes of a lump sum award or a PPO.[10]

The defendant's position on this requires some scrutiny. Initially, the defendant stated, by solicitor's letter dated April 11, 2019, that, since commencement of the PPO regime, it was the general approach of the State Claims Agency to seek a PPO in all cases, rather than a further interim arrangement. As it turned out, the defendant's own independent experts agreed that it was indeed too early in the plaintiff's development to make an accurate prediction in relation to his long-term outcome and his future therapeutic and care requirements.[11] The defendant then altered their position, on October 1, 2019, accepting that an interim lump sum arrangement was in the best interest of the plaintiff.[12]

By that stage, the plaintiff had applied to the President of the High Court seeking an order that the assessment hearing proceed on the basis of an interim lump sum.[13] The President directed a trial before a judge of the High Court on October 22, 2019, of the following issues:

(i) whether or not the 2017 Act ousts the inherent jurisdiction of the Court to assess damages for a claimant's needs on an interim basis without imposing the PPO regime under the 2017 Act;
(ii) if jurisdiction is not ousted, a determination as to what are the best interests of the plaintiff herein (interim three-year assessment or PPO);
(iii) whether the Court is precluded by the 2017 Act from fixing an increase other than the amount specified in the HICP; and,
(iv) whether and to what extent the Court retains a jurisdiction to identify a means by which indexation of the recurring payment can be achieved that would avoid the risks of the recurring compensation falling behind having regard to wage and medical inflation.

Following the President's order, the defendant contended that the trial of these issues had become moot,[14] since the defendant now accepted that an interim assessment was in the interests of the plaintiff. However, Murphy J. rejected this submission. She held that the issues to be determined were wider than the initial order (for an interim lump sum award) sought by the plaintiff.[15] The Court observed that, while the defendant agreed to a three-year adjournment and interim award, "within a year or two the issue of a final lump sum payment or a further interim payment or a Periodic Payment Order will once again raise its head", and that it was in that context "that the plaintiff's lawyers have raised their fundamental objection to the legislative PPO scheme, namely that the scheme as currently structured will not provide the minor plaintiff with the 100% compensation for loss to which he is entitled".[16] As regards issue (i), the Court concluded that Part IVB CLA 1961 does not oust the Court's jurisdiction to adjourn proceedings and grant an interim lump sum award under Order 36, r. 4 RSC; an intention to do so was not expressed in Part IVB CLA 1961.[17] The PPO regime adds another string to the bow of the High Court but, as a result of the matters discussed in relation to issue (ii), "it is a string which may not be played as frequently as might have been hoped".[18] In this regard, the Court concluded that a PPO was not in the best interests of the plaintiff.[19] As regards issue (iii), the Court concluded that the Court cannot apply an index other than that fixed by Part IVB CLA 1961.[20] Finally, in relation to issue (iii), the Court concluded that there was no jurisdiction to temper the effects of the index stipulated by Part IVB CLA 1961.[21]

The purpose of a PPO regime

The purpose of a PPO regime is to provide total cover (the 100% principle),[22] for certain future costs, avoiding the limitations of a lump sum award, which arise from the impossibility of predicting future needs and life expectancy.[23] A one-off lump sum could be spent long before death, with the result that serious debilitating needs are unmet due to lack of funds. On the other hand, it could create a windfall for the beneficiaries of the estate of a claimant who dies before predicted mortality. Avoiding the need to predict the future creates a more certain and just outcome.

It is worth observing that the 100% principle applies equally to lump sum awards as it does to PPOs.[24] However, the removal of the need to predict the future should, in a properly indexed PPO, mean that the 100% principle is more likely to be achieved. Crucially, the court, in awarding compensation pursuant to the 100% principle, must eschew any consideration of policy concerns held by defendants.[25]

The award of a PPO under Part IVB of CLA 1961

S. 51I CLA 1961 provides for the award of PPOs. S. 51I confers upon the court the power to order that the whole or part of damages for personal injuries that relate to the future medical treatment and care of the plaintiff and, if agreed, even future loss of earnings (the PPO Heads of Loss) be paid in the form of a PPO. The wording of the section suggests that it is only at the end of the full hearing that the court will decide whether or not to make a PPO, and that no formal application by either party would be required for the court to have jurisdiction, and this would appear to be supported by the PPO Rules.[26]

S. 51I(2) CLA 1961 provides that in deciding whether to grant a PPO, the court shall have regard to the best interests of the plaintiff[27] and the circumstances of the case.[28] The circumstances of the case include the nature of the injuries suffered by the plaintiff[29] and the form of award that would, in the court's view, best meet the needs of the plaintiff.[30] The court is to have regard, *inter alia*, to the form of award preferred by a plaintiff and the reasons for that preference, financial advice received by the plaintiff in relation to the form of the award, and the form of award preferred by a defendant and the reasons for that preference.[31]

Experience from England and Wales demonstrates that the litigants' preferences will yield to the court's view of the best interests of the plaintiff. Thus, while the preference of the parties is to be taken into account, it is not conclusive, and the preference of the plaintiff is not to be taken as being of greater value to that of the defendant.[32]

The author is not aware of any robust economic analysis of the decisions defendants make in catastrophic injury cases. It will be recalled that, in *Hegarty*, the opening position of the State Claims Agency was that, as a matter of generality, it would seek, in all cases, a PPO instead of an interim lump sum award. This position could not admit of any consideration of the best interests of the plaintiff. It was made purely to safeguard the interests of the State Claims Agency.

S. 51I CLA 1961 effectively creates a remedies competition,[33] an issue we will return to below. For now, consider the consequences for a plaintiff of an improvident PPO being awarded by the court under s. 51I CLA 1961, coupled with the unavailability of an appeal for the exercise of that discretion.[34] This legislative bind requires heightened judicial vigilance as to the reasons for any preference expressed by a defendant.

Indexation

The indexation of the annual amount stipulated in a PPO is all important. If the index is improvident relative to inflation in the annual cost of PPO Heads of Loss, then the purpose of the PPO regime is hopelessly undermined. Acknowledgment that the 100% principle was the very purpose of the PPO regime in England and Wales[35] is what led the Court of Appeal to exercise discretion conferred by legislation[36] to disapply the default index and apply an index more reflective of inflation specific to the provision of care.[37]

A detailed analysis of section 51L CLA 1961 is contained in the second article, which the reader can access, if needs be. In summary, the appraisal in the second article is not positive due largely to:

(i) the imposition by s. 51L CLA 1961 of an improvident default index (by which the annual amount stipulated in a PPO was to increase to keep pace with inflation);[38]
(ii) the concentration of the power to alter that index in the executive and the legislature;[39]
(iii) the exclusion of *restitutio in integrum* and the 100% principle from the matters to be considered by the executive in reviewing the appropriateness of that index and/or deciding to alter it;[40]
(iv) the lack of any power conferred on the courts to alter the index;[41] and,
(v) the restricted right of appeal from a decision to award a PPO subject to the default index.[42]

The result is legislation that is practically stillborn. The most dispiriting feature of all of this is that it was quite intentional. The plaintiff's lawyers, in *Hegarty*, had obtained a copy of a report from Towers Watson provided to the Government in March 2014. That report recommended the Consumer Price Index (CPI)/HICP plus a percentage indexation, which percentage indexation was never implemented.[43] An inter-departmental working group was then established and produced a report that was replete with references to the policy objective of ensuring certainty for defendants and had nothing to do with the 100% principle or *restitutio in integrum*.[44] The policy objectives of the State Claims Agency to achieve certainty in the projected amounts of annual payments were permitted to negate the very purpose of a PPO regime and to trump more existential concerns of claimants injured by the wrongdoing of others.

Interaction between the decision to award a PPO S. 51I and the index prescribed by 51L CLA 1961

There is a clear linkage of the award of a PPO and the viability of the index prescribed by the PPO legislation. Put simply, if the court is convinced that the index is so improvident as not to be in the plaintiff's best interests, or not to best meet the needs of a plaintiff, a lump sum will be awarded. In *A v Powys Local Health Board* [2007] EWHC 2996 (QB) (*A v Powys*), Lloyd-Jones J. awarded a lump sum because the claimant was in the process of moving to Ireland and the evidence was that there was no earnings series appropriate to use for indexing carers' earnings in Ireland. While this decision predates CLA 2017 by a decade and there may now be appropriate earnings series in this jurisdiction, they have not been adopted by s. 51L CLA 1961. The judgment in *A v Powys* therefore exemplifies the approach the Irish courts could take in deciding whether or not to make an award of damages by way of PPO linked to the HICP.[45] In a paper delivered at a Bar of Ireland CPD seminar in April 2018, the author suggested, in the light of *A v Powys*, that when the courts in Ireland eventually come to consider whether or not to award a PPO under the new legislation, it was certainly conceivable, in the context of the index currently stipulated, that a court would conclude that a PPO would not be in a plaintiff's best interests. In this context, it was suggested by the author that there was a real danger that the Irish PPO regime would itself become "a dead letter". As will be seen, in *Hegarty* the courts did eventually come to consider this question.

Hegarty and indexation

The plaintiff had adduced evidence on this issue from a doctor in actuarial mathematics, an actuary, a labour economist, an economist specialising in micro-economics and a financial adviser.[46] The defendant put up no evidence.[47] The Court described as "overwhelming" the evidence that indexation of periodic payments by reference to the HICP would result in under compensation of a plaintiff, would not provide 100% compensation for future costs, and that the PPO should be linked to a wage-based index to ensure full compensation.[48]

Dr Shane Whelan confirmed the likelihood that wages would rise by 1.5% per annum higher than inflation in the long term, and that the cost of medical treatment, and aids and appliances associated with care, would continue to rise by 1.5% per annum above inflation. Thus, a PPO adjusted annually with reference to the HICP would transfer to the plaintiff the risk that the cost of care, etc., exceeds the payments made under the PPO. Future payments under the PPO increasing in line with the HICP would lag behind the actual increase in such costs and loss by about 1.5% per annum. The evidence established that "by age 50, a periodic payment order linked to the HICP index would only meet 48% of the plaintiff's annual care costs".[49]

The expert labour economist, Prof. Victoria Wass, assessed the process by which the State arrived at its decision to adopt the HICP, concluding that the dominant purpose behind its adoption was to minimise volatility in the amount of annual payments.[50] The report of the interdepartmental working group referred to above was clearly motivated by the need to provide certainty to defendants, a policy approach which, Murphy J. noted, "was firmly rejected by the High Court and the Court of Appeal in the *Russell* case. The court's duty is to provide 100% compensation to a catastrophically injured plaintiff, regardless of policy concerns".[51]

Prof. Wass suggested that the Earnings Hours and Employment Costs Survey (EHECS) carried out quarterly by the Central Statistics Office was an appropriate measure. While it was rejected by the interdepartmental working group, it has been used in England and Wales in the award of PPOs, under the Damages Act, 1996, to Irish resident claimants.[52] Prof. John Kay, economist, suggested indexing care costs to average earnings and medical costs to either the CPI or the HICP plus 3%.[53] The evidence of the actuary and financial adviser further supported the criticism of the HICP. Murphy J. concluded that no judge, charged with protecting the best interests of a plaintiff, which is the first requirement for the exercise of a court's discretion under the legislative scheme, could approve a PPO adjusted by reference to the HICP.[54] While this appears a little too emphatic, it was clearly based on the evidence that was before the Court, which overwhelmingly deprecated the HICP as an appropriate index for a PPO. It will be recalled that the defendant put up no evidence and the Court was not addressed upon the viability of a PPO relative to a one-off lump sum award. It simply did not arise. Therefore, the Court's finding was based upon the evidence before it. In considering the "financial advice received by the plaintiff in respect of the form of the award" as required by s. 51I(2)(b)(ii), the Court concluded that "on the basis of the expert evidence before the court, … no competent financial expert would recommend a periodic payment order linked to the harmonised index of consumer prices to provide for the future care needs of a plaintiff".[55] Again, while this conclusion appears a little too general, it was made on the financial evidence available to it, all of which went one way. The ultimate assessment was in the following pithy terms:

"In its current form therefore, the legislation is regrettably, a dead letter. It is not in the best interests of a catastrophically injured plaintiff to apply for a PPO under the current legislative scheme".[56]

The description of the current PPO legislation as a dead letter is surely correct, save for the improbable scenario where the parties consent to adopt an index taking account of wage inflation trends rather than general inflation.[57]

The remedies competition under Part IVB CLA 1961 – back to the future?

S. 51I CLA 1961 will require the court to decide whether to award a PPO or a lump sum. A PPO linked to an acceptable index should, save in exceptional circumstances, be in the plaintiff's best interest and better meet their needs. Where, however, the landscape is distorted by a clearly improvident index that has no place in a PPO regime, the result is that the parties are led inexorably back to arguing about life expectancy.

To take but one example, the financial evidence could conceivably establish that, for a limited period at least, a PPO linked to the HICP, while not offering 100% cover, may offer better cover than a lump sum award. The plaintiff may argue that

this is irrelevant because life expectancy exceeds the limited period during which the HICP-linked PPO could be said to be more advantageous. The defendant may argue that, in fact, life expectancy is limited to that very period. In order for the court to determine the issue, it would first have to determine the issue of life expectancy because it would not be possible to compare a lump sum with a PPO without doing so. The very possibility that the court would need to resolve life expectancy brings it back to predicting the future in deciding whether to grant a PPO. This is the ultimate failure, all due to a default index known to have been improvident but adopted out of policy concerns to ensure budgetary certainty for defendants.

Conclusion

Hegarty confirms that the only way the courts can temper the negative effects of the indexation provisions is to exercise the discretion it does have and refuse to grant a PPO at all. In the face of anticipated and quite proper judicial nullification of that sort, Part IVB CLA 1961 is rightly described by Murphy J. as a dead letter.

References

1. Report published on October 29, 2010.
2. Keating, A. Slow change. *The Bar Review* 2018; 23 (1): 17.
3. Bar of Ireland CPD, Periodic Payment Orders, Alan Keating BL. The paper may be accessed via the member's section of the Law Library website, or via the following link: https://members.lawlibrary.ie/app/uploads/Secure/PPO-Legislation-Final.pdf.
4. CLA 2017 was enacted on November 22, 2017, and commenced on October 1, 2018, by S.I. 377 of the 2018 Civil Liability (Amendment) Act, 2017 (Parts 1, 2 and 3) (Commencement) Order 2018.
5. As will be seen, the views in the second article need not be reviewed.
6. *Hegarty (a minor) v HSE* [2019] IEHC 788, per Murphy J. at §§ 33 to 46. In this regard, see *Russell (a minor) v HSE* [2016] 3 IR 427, per Irvine J. at §§ 5 to 16, and again at §§ 64 and 66.
7. at §47.
8. *Corroon (a minor) v Pillay's General Hospital Limited* (unreported, Barton J., October 29, 2014); *Grace O'Neill (a minor) v National Maternity Hospital* [2015] IEHC 160; *North Western Health Board v W. (H)* [2001] IESC 9; *Gillick (a minor) v Children's University Hospital* (unreported, High Court, April 12, 2016); and, *O'Mahony (a person of unsound mind not so found) v Southern Health Board* (unreported, Moriarty J., November 7, 2014).
9. at §§ 56 to 59 relying upon *McEnry v Sheahan* [2019] IESC 64, *A.M. v HSE* [2019] IESC 3, and s. 51I(1) and (2) CLA 1961.
10. at § 5 and §§10 to 14 (in which the evidence was recited).
11. at § 15 and 60.
12. at § 23.
13. at §§ 6 to 9 and §§ 12 to 14. The President was exercising his supervisory capacity in wardship matters.
14. at §§ 15 to 30.
15. at § 31.
16. at § 61.
17. at §§ 56 to 59 relying upon *McEnry v Sheahan* [2019] IESC 64, *A.M. v HSE* [2019] IESC 3, and the discretionary nature of the power to grant a PPO under s. 51I(1) and (2) CLA 1961.
18 at § 59.
19. at §§ 60 to 76.
20. at §§ 77 to 82.
21. at §§ 83 to 84.
22. *Flora v Wakom (Heathrow) Ltd* [2008] 1 WLR 2207; [2006] EWCA Civ 1103, per Brooke L.J. at §§27 to 29; and, *Tameside and Glossop Acute Services NHS Trust v Tompstone* [2008] 1 WLR 2207, per Waller L.J. at §§ 34 and 35.
23. *Lim Poh Choo v Camden and Islington Health Authority* [1980] AC 174, per Scarman L.J.; *Russell (a minor) v Health Service Executive* [2016] IECA 236, per Irvine J. at § [7]. For academic commentary, see McMahon and Binchy, *Law of Torts (4th ed.)*, para 44.99 to 44.100; *McGregor on Damages*, Sweet & Maxwell (2nd ed., 2018) at para 40-004; and, Boylan, *A Practical Guide to Medical Negligence Litigation*, Bloomsbury 2016, at page 242.
24. *Russell (a minor) v HSE* [2016] 3 IR 427, per Irvine J. at §§ 64 to 72; and, *Hegarty (a minor) v HSE* [2019] IEHC 788, per Murphy J. at §§ 33 to 46, and again at §47(I).
25. *Russell (a minor) v HSE* [2016] 3 IR 427, per Irvine J. at §§ 64 to 72.
26. See Order 1A, rule 15 RSC (inserted by the PPO Rules) – it is where the court has made a determination to award damages that the court can then proceed to deal with the PPO issue by way of a separate and subsequent hearing, if necessary.
27. S. 55I(2)(a) CLA 1961.
28. S. 55I(2)(b) CLA 1961.
29. S. 55I(2)(b)(i) CLA 1961.
30. S. 55I(2)(b)(ii) CLA 1961.
31. S. 55I(2)(b)(ii)(I) to (V) CLA 1961.
32. *Tameside and Glossop Acute Services NHS Trust v Thompstone* [2008] 1 WLR 2207 para 108; see also *Morton v Portal Ltd* [2010] EWHC 1804 (QB).
33. S 51N CLA 1961 restricts the right of appeal from a decision under, *inter alia*, s. 51I (whether or not to grant a PPO) to an appeal on a point of law only. Given that the court's decision under s. 51I would be the product of findings of fact based upon factual and opinion evidence, it appears vanishingly unlikely that a decision whether or not to grant a PPO would be the subject of an appeal.
34. S. 51N CLA 1961.
35. Damages Act, 1996, s. 2 as amended by the Courts Act, 2003, s. 100.
36. Damages Act, 1996, s. 2(8) as amended by the Courts Act, 2003, s. 100.
37. *Flora v Wakom (Heathrow) Limited* [2007] 1 WLR 482; and, *Tameside and Glossop Acute Services NHS Trust v Tompstone [2008] 1 WLR 2207*.
38. S. 51L(1) CLA 1961.
39. S. 51L(2) to (7) CLA 1961.
40. S. 51L(5) CLA 1961.
41. S. 51L(2) to (7) CLA 1961. The absence of any role for the court in this jurisdiction was acknowledged in *Hegarty*, per Murphy J. at §§77 to 82.
42. S. 51N CLA 1961.
43. See *Hegarty* at § 12.
44. See *Hegarty* at § 68.
45. *A v Powys Local Health Board* [2007] EWHC 2996 (QB), para 20 to 26.
46. at § 16 to 21.
47. at § 22.
48. at § 63.
49. The evidence of Dr Shane Whelan FFA FSAI is set out at § 64 and § 65.
50. at § 67 where the court recites the evidence of Prof. Victoria Wass.
51. at § 68.
52. at § 69 and 70.
53. at § 71.
54. at § 73.
55. at § 74.
56. at § 73 and 74.
57. *Hegarty*, at § 75 and 76.

Adrian Mannering SC

"Nothing less than poetry could suffice to describe the barrister who graced the legal bench in Kilmainham Court last week. 'A thing of beauty is a joy forever' is the phrase that came to mind. The beautiful young man was a joy to behold. His curly hair flowed in waves to the nape of his neck. His snowy high-collared starched shirt provided a brilliantly white background to his softly glowing burgundy tie. A gold chain across the vest drew the admiring eye to the superb cut of his three-piece suit."

Nell McCafferty, in chronicling proceedings in the District Court in the 1980s for *The Irish Times*, did not name the dashing lawyer who bravely fought a hopeless case of larceny before an unsympathetic beak. However, when she noted our hero placing "a foot on the bench, his back to the witness, affording us a full view of his magnificence, his very shoe evoked appreciation – it was black and polished to the highest degree of reflection", there could be no doubt that it was Adrian Mannering who had caught the discerning eye of the renowned journalist. A few years after his service in the mechanic corps of the RAF No. 1 Squadron Norfolk, in addition to working on Harrier jump-jets, he had learned how to perfectly polish his shoes.

Born in Dublin in 1948, Adrian was the third of four children of Susanne and Harry Mannering. Having shown early academic promise, Adrian was awarded a scholarship to Sandymount High School. Thereafter, with no realistic path to university, he enlisted with the Royal Air Force with the hope of availing of the educational opportunities that would open up. Deployments to Libya and Norway followed before Adrian demobilised to enrol in the University of Sussex at Brighton, where he completed a degree in economic history. A gifted singer, songwriter and storyteller, Adrian was a natural fit in Brighton's music scene. After completing college, he went to New York, where for a spell he joined the Greenwich Village folk scene, subsequently returning to Dublin on a wave of songwriting and poetry. He recommenced study, first at UCD and then at the King's Inns, where he displayed his oratory prowess to win the Kenny Gold Medal for Legal Debate in 1979.

Fierce advocate

He was called to The Bar of Ireland in Michaelmas Term, 1980, and devilled with Denis Vaughan Buckley (who features along with his "Viking children" in Adrian's song On Leighlin Road, a soulful paean to Phil Lynott). Adrian soon built a reputation as a fierce advocate, with a bright intellect and a superb recall of detail. With his effortless charm and his forceful personality, he soon became well known throughout the courts. He positioned himself as a progressive outsider, beyond the mainstream political circuits, and a staunch opponent of conservative views and laws. But Adrian was also sensitive to the problems affecting his beloved Dublin; he undertook pro bono work and many difficult cases involving social injustice. As he became more accomplished and experienced over the years, he remained an enthusiastic proponent of the independent Bar, and to that end gave freely of his time and knowledge to many young devils and barristers starting out in their careers, many of whom recall to this day the depth of his kindness. Later in his career, when briefed in the criminal courts by both the DPP and defence solicitors, his extensive command of the English language was unleashed on many a Dublin jury to great effect. His closing speeches were intense, far from formulaic, never boring or predictable, and would often contain a splattering of 'Dublinese' that Joyce himself would have been proud to pen. He took silk in Hilary Term 2004, and while he continued a wide practice, he retained his love of the criminal law. Throughout his career, Adrian was filled with political and social idealism, honed in no small part in a family household that prided itself on its Clann na Poblachta connections, and which hosted many a heated meeting, resulting in Adrian developing a particularly strong pride for his country, "plucky little Éire". He possessed a genuine love of his city, which manifested itself in many diverse ways, from his one-man campaign against the ugly proliferation of superfluous street signs and poles, to the planting of trees in the grounds of the King's Inns, to the lyrics of his songs with their references to Dublin Bus numbers and blackbirds singing by the Grand Canal.

Adrian met Ellen Nippolt in the early 1980s, an architectural student and visual artist from Portland, Oregon. Their relationship was electric, they soon wed, and their son Robert soon followed. The whirlwind romance didn't last, with Ellen going back to America with their son within a few years. Despite the distance, Adrian remained a committed and loving father, and was delighted when Robert returned to Dublin to live with him in the summer of 1997.

A life well lived

When Adrian retired in 2010, the Bar lost a significant thread of colour and character from the fabric of its rich tapestry. But thankfully in his retirement years, he remained in touch with many of his colleagues, always attending the big nights, such as benchings in the King's Inns. A passionate gardener, in retirement Adrian turned his small garden in Harold's Cross into a wonderful oasis where he spent a lot of his time. He could be seen on his bicycle across Dublin every day (often with various pots and plants precariously balanced on a plank of wood on the back carrier). He continued to play guitar and sing in venues across the city, including every week at the Teachers' Club. As Robert told the assembled friends in Mount Jerome in January on the occasion of the celebration of Adrian's life, while he passed suddenly, he did so gracefully and effortlessly in his beloved garden. A long, drawn-out decline was not for Adrian and would have been anathema to his intense and passionate way of living. Thus it was noteworthy that the last book he was reading was *King Lear*, a play replete with the theme of ageing. Perhaps we might take some small comfort on the loss of a great friend, that like King Lear, Adrian would: "hate him that would upon the rack of this tough world stretch him out longer".

Adrian was a generous man who thought the world of those he knew. His dyed-in-the-wool romanticism left a huge impression on whomever he met. He was a great man and a true Dub, and he will be missed by all his friends and colleagues at the Bar.

Poet and lyricist to the end, pinned to Adrian's dry-cleaned and neatly put away frock coat and silk gown was a slip of paper declaring:

"Here, now, to the end we come,
No more pleading, all is done,
No more swearing, up and down,
Left behind, both wig and gown".

PC and RM

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

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Published on Courts.ie – January 17, 2020, to March 12, 2020
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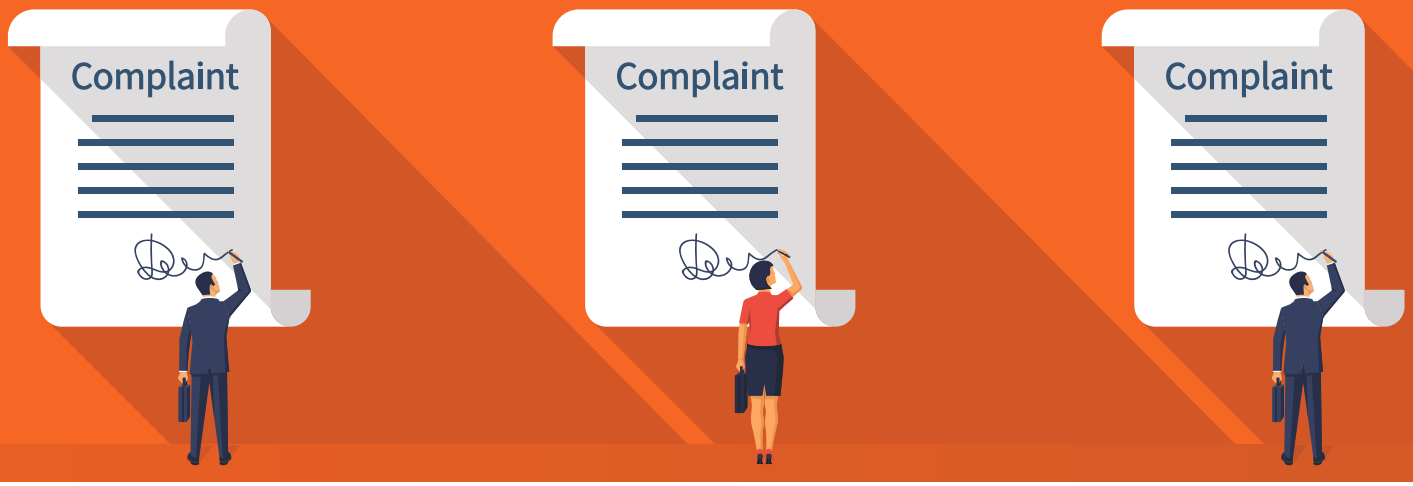
Friends of the Environment CLG v The Government of Ireland and anor [2020] IESCDET 13 – Leave to appeal from the High Court granted on the 13/02/2020 – (Clarke C.J., Irvine J., Baker J.)

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

Complaints to the Legal Services Regulatory Authority



Barristers are now subject to the complaints procedures of the LSRA and it is important for practitioners to understand the processes involved.

Sean Gillane SC
Chairman, Professional Practices Committee

The Legal Services Regulatory Authority (LSRA) is a statutory body, which regulates the provision of legal services by legal practitioners and ensures the maintenance and improvement of standards in the provision of legal services in the State. On October 7, 2019, the LSRA commenced receiving and investigating complaints against legal practitioners in relation to inadequate services, excessive costs, and what might amount to misconduct.

The three grounds for complaint under Part 6 of the Legal Services Regulation Act 2015 (the Act) are:

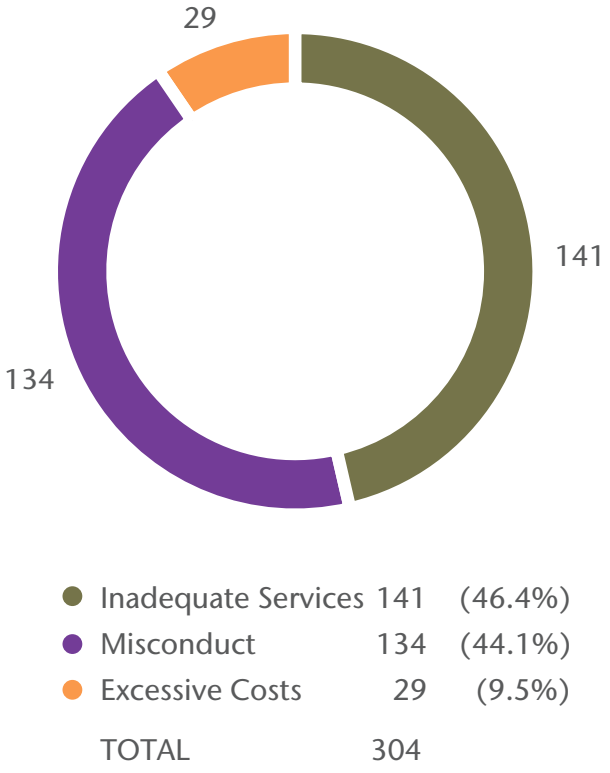
- that the legal services provided were of an inadequate standard;
- that the amount of costs sought by the legal practitioner were excessive; and,
- that the legal practitioner performed an act or omission, which amounts to misconduct under the Act.

Misconduct is broadly defined in the Act and includes an act or omission that involves fraud or dishonesty, or which is likely to bring the profession into disrepute. The provision of legal services that are inadequate to a substantial degree, or the seeking of grossly excessive costs, can also be misconduct under the Act. Only a client – or a person acting on behalf of a client – can bring a complaint to the LSRA where the client considers that the services provided were of an inadequate standard or that the fees charged were excessive. When it comes to alleged misconduct by a solicitor or barrister, any person can make a complaint to the LSRA.

The LSRA published its annual report in early March 2020, which sets out an overview of the complaints received during the period October 2019 to December 2019. Of the 304 complaints received, 141 (46.4%) related to inadequate services, 134 (44.1%) related to misconduct, and 29 (9.5%) related to excessive costs. Further details in relation to the area of law to which each complaint relates are contained in the 2019 LSRA Annual Report (www.lsra.ie). Notably, only three complaints related to barristers.

There is a useful guide available on the LSRA website setting out information for practitioners when a complaint is made to the LSRA about a legal practitioner, which should be read in conjunction with the Act.

The following article sets out a high-level overview of the general process that is invoked when a complaint is made under each of the three categories.



1. Inadequate service

Preliminary review

Complaints of an inadequate standard of service can be made by your client (or your client's representative) and are initially processed by the LSRA executive.

In the first instance, a practitioner against whom the complaint is being made will be provided with a copy of the LSRA complaint form and all documents submitted to the LSRA executive by the complainant, and asked to respond to the complaint.

Once the LSRA executive receives a response, and any additional information that it may request, it will conduct a preliminary review to decide whether or not the complaint is admissible.

Sometimes, the practitioner will try to resolve a complaint as soon as they receive a copy of the complaint and before the LSRA executive has determined the complaint to be admissible. This is acceptable to the LSRA executive and, where this occurs, the executive will consider the complaint and determine if any further investigation is required.

Admissibility

Admissible means that the complaint meets the criteria set out in the Act; in other words, it is one of inadequate service, is not frivolous or vexatious or without substance or foundation, and has been made within the required time limits.

It is important that practitioners are aware that the complaint will not be admissible if it was previously made to the Bar Council or King's Inns, and was determined by one of those bodies, even if the complainant was unhappy with the outcome. If a practitioner is notified of a complaint that was previously determined, they should advise the LSRA executive of this fact and the details of the original complaint. This will enable the executive to correctly determine the admissibility of the complaint.

The LSRA executive will then notify the practitioner and the complainant that the complaint has been determined to be either inadmissible or admissible, and the reasons why.

Informal resolution

The LSRA executive is required under the legislation to offer the practitioner and the complainant the option to resolve a complaint of inadequate service (including of a substantial nature) through informal resolution.

The informal resolution process is voluntary and is provided by trained mediators, and aims to facilitate the resolution of a complaint at an early stage with both parties arriving at an agreed solution, rather than having a solution imposed on them. There is no charge for the mediation conducted by LSRA executive staff.

The parties can also choose to enter mediation conducted by a third party; however, charges will apply and they must be borne equally by the parties, unless an agreement is reached between the parties regarding costs.

Informal resolution is a confidential process and if a practitioner opts to engage in it, but cannot resolve the complaint, any information obtained through the process must remain confidential to the parties involved in the resolution process. This means that if the complaint goes on to a full investigation, the committee tasked with the investigation will not know of or be given any answers or statements made in the informal resolution process.

Determining unresolved complaints

If the parties choose to reject the invitation to participate in the informal resolution process, the LSRA executive will write to the practitioner and the complainant asking for a statement setting out a response in relation to the complaint to be submitted within 21 days. The LSRA will then make a determination regarding the complaint and the executive will decide whether or not services were inadequate. Both parties will be notified of the determination made and given an opportunity to appeal that decision to a review committee.

LSRA executive directions

There are a range of directions open to the LSRA executive. Where the LSRA considers that the legal services provided were of an inadequate standard, and that it is, having regard to all the circumstances concerned, appropriate to do so, the executive of the Authority may direct the practitioner to do one or more of the following:

(a) secure the rectification, at his or her own expense, of any error, omission or other deficiency arising in connection with the legal services concerned;

(b) take, at his or her own expense (which shall not exceed €3,000), such other action as the Authority may specify;

(c) transfer any documents relating to the subject matter of the complaint to another practitioner nominated by the client, subject to such terms and conditions as the Authority may consider appropriate, having regard to the existence of any right to possession or retention of any of the documents concerned vested in the practitioner to whom the direction is issued; and,

(d) pay to the client a sum not exceeding €3,000 as compensation for any financial or other loss suffered in consequence of the legal services provided by the practitioner to the client being of an inadequate standard.

The practitioner will be provided with a copy of the direction made and given an opportunity to consider it and decide whether or not to appeal the decision. Both the practitioner and the complainant are entitled to seek a review of the determination made by the LSRA. If the complaint relates to inadequate services and a review is sought by either party on the direction made by the LSRA, the direction will cease to have effect.

The LSRA Review Committee

This committee reviews determinations and directions made by the LSRA executive that relate to complaints of inadequate standard of service. The Review Committee is made up of three people: two lay people and a barrister. If the practitioner or the complainant request a review, the secretary to the LSRA Review Committee will write to both parties asking each to provide a statement in writing to it, setting out why they feel that the determination reached by the LSRA executive relating to inadequate standard of services was incorrect or unjust.

The Review Committee will review all the documentation available to it and make one of the following decisions:

- confirm the determination of the LSRA executive;
- send the complaint back to the LSRA executive to be dealt with again; or,
- issue one or more direction to the practitioner, which the LSRA is authorised to issue.

If the practitioner and/or the complainant accept the determination of the review committee, it shall become absolutely binding on the practitioner (and the complainant) 21 days after the decision has been notified to the parties. If a practitioner without good reason refuses, neglects or otherwise fails to comply with the determination, the practitioner may be guilty of an offence and could be prosecuted in the District Court. The LSRA may also consider this to be a professional conduct matter.

High Court appeal

If a practitioner or complainant remains dissatisfied with a decision of the LSRA Review Committee, they may apply to the High Court for an order directing the LSRA Review Committee to rescind or vary the determination as the High Court considers appropriate.

2. Excessive cost

Complaints of excessive costs can be made by your client (or your client's representative) and are initially processed by the LSRA executive. The LSRA executive process of preliminary review, admissibility, informal resolution, determination, etc., is as outlined above, except under the LSRA executive directions.

LSRA executive directions

There are a range of directions open to the LSRA executive. Where the LSRA executive considers that the amount of costs sought in respect of legal services provided to the client by the practitioner was or is excessive, and that it is, having regard to all the circumstances concerned, appropriate to do so, it may direct the practitioner to do one or more of the following:

(a) refund without delay, either wholly or in part as directed, any amount already paid by or on behalf of the client in respect of the practitioner's costs in connection with the bill of costs; and,

(b) waive, whether wholly or in part as directed, the right to recover those costs.

The practitioner will be provided with a copy of the direction made and given an opportunity to consider it and decide whether or not to appeal the decision. The LSRA Review Committee operates as outlined above.

Party ordered to pay legal costs of another

In the case where a party is ordered to pay the legal costs of another, this process is governed by the Office of the Legal Costs Adjudicator under Part 10 of the 2015 Act. As part of the Government's commitment to provide for transparency in the area of legal costs, the Office will, in addition to undertaking those processes previously undertaken by the Taxing Master's office, establish and maintain a register of determinations of applications for adjudication of legal costs.

The Chief Legal Costs Adjudicator and legal costs adjudicators will exercise adjudicative functions in assessing legal costs. Their job is to provide an independent and impartial process of assessment of legal costs, which endeavours to achieve a balance between the costs involved and the services rendered. Chapter 4 under Part 10 of the Act provides the framework for the determination of legal costs.

3. Allegations of misconduct

Section 50(1) of the Act defines misconduct. Complaints of misconduct can be made by any person. The same LSRA executive process outlined previously will apply regarding admissibility. Admissible complaints of misconduct, however, are referred to an LSRA Complaints Committee for investigation.

LSRA Complaints/Divisional Committee

The LSRA Complaints Committee is made up of 27 members, who will be appointed in groups of three or five to investigate each individual complaint. These smaller committees are called LSRA divisional committees.

A divisional committee will consider and investigate complaints relating to misconduct that are referred to it by the Complaints Committee. The divisional committee will receive a copy of the complaint and any documents that have been submitted by both the practitioner and the complainant, together with a summary of the complaint. The committee will then write to the practitioner, providing them with a copy of the complaint, together with a copy of any documents relating to it, and request a response.

The divisional committee may also send the practitioner a notice in writing and may request:

- that the practitioner verify anything contained in their response to the complaint;
- that the practitioner provide information or documents relating to the complaint; and,
- that the practitioner verify information by way of an affidavit.

A practitioner is required to comply with any notice issued to them. If a practitioner agrees that the complaint against them is warranted, they will have the opportunity to accept a sanction rather than have the complaint undergo a full investigation.

Investigations

If the practitioner responds indicating that they are not in agreement with a sanction, the divisional committee will provide the complainant with a copy of the practitioner's response and invite them to provide views on it. If the committee determines that the matter complained of is not one that warrants a sanction or direction, it will advise the practitioner and the complainant in writing, and give reasons for its decision. If a practitioner is willing to accept the complaint of wrongdoing and a sanction that may be imposed, the divisional committee will make a determination and direction regarding the complaint.

If the divisional committee is not satisfied with the practitioner's response, or if the practitioner does not respond, it will proceed to investigate the complaint as it considers appropriate. A practitioner may represent themselves or they may be represented by a person of their choice for the purpose of appearing before the divisional committee. Please be aware, however, that the costs of such representation, if any, shall be borne by the practitioner.

The divisional committee may decide to accept the withdrawal of a complaint by the complainant; however, if the divisional committee is of the opinion that an investigation should proceed despite the complainant's withdrawal, it will notify the practitioner and the complainant of its decision.

Determinations and directions

Where the divisional committee determines that the complaint warrants the imposition of a sanction, it may specify one or more of the options that are set out in section 71 of the Act.

Where the divisional committee considers that the act or omission that is the subject of the complaint is of a kind that is more appropriate for consideration by the Legal Practitioners Disciplinary Tribunal (LPDT), it may make an application in respect of the matter to it for the holding of an inquiry.

High Court appeal

A determination of the divisional committee can be appealed to the High Court by the practitioner or the LSRA. There is no appeal mechanism available for complainants.

The LPDT

This process is usually reserved for very serious types of misconduct complaints that the complaints/divisional committee considers too serious for it to investigate. Allegations of a criminal nature made against a legal practitioner may be referred to An Garda Síochána for investigation. Other serious allegations, which do not involve criminality, can be referred to the LPDT if the complaint/divisional committee considers that it is more appropriate. The LPDT is completely independent of the LSRA. It is made up of 33 members appointed by the President of the High Court, on the nomination of the Minister for Justice and Equality.

The LPDT has a majority of laypersons appointed to it and its role is to conduct tribunals of inquiries into allegations of misconduct made against legal practitioners. The inquiry is conducted by way of an oral hearing, which is normally held in public, unless the LPDT is satisfied that it should be held in private. The legislation allows the LPDT to call witnesses, hear evidence and make a determination in a case. It can also prosecute someone in court for failing to appear before it, refusing to produce documents, or giving false information, which hinders or obstructs the tribunal.

LPDT sanctions

The LPDT has a wide range of sanctions available to it, from impacting on a practitioner's practising certificate to imposing substantial fines, and may make an order imposing one or more sanctions on the practitioner as set out under section 82 of the Act. The LSRA and/or the practitioner can appeal a decision of the LPDT to the High Court.

Conclusion

As noted in the LSRA Annual Report 2019, in the relatively short period of time to the end of 2019, certain themes in relation to the complaints received have started to emerge. One feature that cuts across almost all complaints is, perhaps unsurprisingly, communication. Where a legal practitioner fails to properly respond and adequately explain issues to clients, then complaints will inevitably follow. Perhaps our communications are something that we should all be mindful of.

Too old to work?

Inconsistent decisions in compulsory retirement age cases have created a headache for employers.

Katherine McVeigh BL

The recent case of *Anne Roper v RTÉ*[1] has again highlighted the difficulty for employers regarding compulsory retirement ages. On December 19, 2019, the Workplace Relations Commission (WRC) awarded €100,000 to Ms Roper in compensation for discrimination on the grounds of age. Ms Roper was an executive producer/director with RTÉ at the time of retirement and requested to work for a further 18 months beyond the age of 65. This request was refused by RTÉ following an internal grievance procedure. The decision in *Anne Roper* is currently under appeal to the Labour Court.[2] Nevertheless, the case has highlighted the contradicting approach of the adjudicating bodies in this area. What is important from the point of view of employers is that the WRC refused to accept the argument advanced by RTÉ that the retirement age of 65 was to ensure "intergenerational fairness", allowing younger workers to progress in RTÉ. This is despite the fact that this argument has been endorsed consistently by the High Court and the Court of Justice of the European Union (CJEU). "Intergenerational fairness" is also provided as an example of a legitimate aim for a compulsory retirement age in the Code of Practice on Longer Working.[3] The case of Anne Roper has again brought to light the balancing act that employers must engage in when dealing with employees nearing retirement. On the one hand, employers are asked to approach older employees in an equal and consistent way. This is primarily to avoid embarrassment resulting from testing the capacity of older employees. On the other hand, employers must deal with employees on an individual basis if a request is made to remain in work beyond a normal retirement age. This individualised approach towards older employees is contrasted with the approach taken by the courts that the purely individual needs of a business will not act as a legitimate aim to objectively justify a compulsory retirement age. A court will enforce the far-reaching duty of an employer to facilitate an employee with alternative roles if such a request is made. Surprisingly, this duty exceeds what is required of an employer when dealing with an employee with a disability. The Supreme Court has recently confirmed that the duty of an employer to provide reasonable accommodation does not require an employer to find an alternative job for an employee with a disability.[4] The 2018 WRC Annual Report revealed a 343% increase in complaints related to discrimination on grounds of age.[5] This is feasibly due to the contrasting decisions in the area, the resulting confusion caused to employers, and their somewhat burdensome duties in relation to employees nearing retirement.

Age as a protected ground in discrimination claims

Age has been described as a "relative newcomer" to the list of characteristics that are protected against discrimination by the courts.[6] The UK Supreme Court in *Seldon v Clarkson Wright and Jakes*[7] has emphasised the importance of putting "stereotypical assumptions out of our minds". The Court also made reference to assumptions pertaining to age and capacity, and stated that "these assumptions no longer hold good (if they ever did) in times of increasing longevity".[8] As a relatively new ground of discrimination, it appears that courts are finding it difficult to secure legal boundaries.[9]

The complexities of age discrimination have recently been demonstrated in Poland, where new legislation requires senior judges to retire at 65 rather than 70. The effect of this legislation was the immediate retirement of numerous Supreme Court judges. This resulted in the case *A.K. and others (Independence of the Disciplinary Chamber of the Supreme Court)*,[10] which was brought to the CJEU in an expedited procedure. This legislation has had a considerable impact on the rule of law in Poland.[11]

Ireland, unlike other EU countries, does not have a fixed retirement age for workers. The usual retirement age is 65 for employees but workers subsequently remain ineligible for State pensions until the qualifying age of 66. This remains the situation despite the European Commission's repeated call on member states to reduce disparities in statutory pension ages, and to review unwarranted mandatory retirement ages.[12] In March 2020, the EU[13] announced that the "priority of EU policy is to encourage Europeans to remain in work longer, to ensure the sustainability of pension systems and adequate social protection".[14]

The Public Service Superannuation (Age of Retirement) Act 2018 was enacted to address this issue and increases the retirement age of most public sector workers from 65 to 70 years of age.[15] Public sector workers who are not covered by the 2018 Act include: the President; the judiciary; the Master of the High Court; and, county registrars. Notwithstanding this governmental intervention, there has been a significant increase in litigation in this area.[16] This has resulted in contrasting decisions in relation to objective justification of a retirement age.

Objective justification of a retirement age

Discrimination on grounds of age is prohibited under the EU Framework Directive,[17] the Employment Equality Acts 1998-2015, and the Constitution.[18] The legal context

for compulsory retirement ages is Article 6 of the Framework Directive, which stipulates that differences of treatment on grounds of age shall not constitute discrimination "if they are objectively and reasonably justified by a legitimate aim" and "if the means of achieving that aim are appropriate".[19] This is transposed into Irish law by virtue of s.34(4) of the Employment Equality Acts 1998-2015.

In February 2020, the WRC confirmed in *A Sales Assistant v A Limited Company*[20] that the test that the WRC is continuing to use in cases concerning compulsory retirement is set out in *Donnellan v The Minister for Justice and others*.[21] In *Donnellan*, the High Court found that a compulsory retirement age of 60 for assistant garda commissioners was objectively justified. Mr Justice McKechnie held:

"[N]ational measures relating to compulsory retirement ages, are not excluded from consideration under [the Framework Directive]. Any discrimination with regards to age must, as put by that Directive, serve a legitimate aim or purpose, and the means taken to achieve that purpose must be appropriate and should go no further than is necessary, i.e., they should be proportionate".

The UK Employment Appeal Tribunal (EAT) in *National Union of Rail, Maritime and Transport Workers v Lloyd*[22] recently held that the correct test to apply when assessing whether an aim is legitimate is: (i) to address the successive questions of whether each asserted aim was a true aim and actual objective; (ii) if so, whether it was capable of being a legitimate aim; and, (iii) whether it was a legitimate aim in the particular circumstances.[23]

The Code of Practice on Longer Working lists examples of legitimate aims that an employer can rely on to retire an employee, including:

- intergenerational fairness (allowing younger workers to progress);
- motivation and dynamism through the increased prospect of promotion;
- health and safety (generally in more safety critical occupations);[8]
- creation of a balanced age structure in the workforce;
- personal and professional dignity (avoiding capability issues with older employees); or,
- succession planning.

The courts have repeatedly held that despite the foregoing list being the 'go to' for employers seeking a legitimate aim for retirement ages, they will scrutinise the aim and seek evidence to justify a retirement age in each particular company.

Consistency and inconsistency

The Code of Practice on Longer Working advises employers to implement objective criteria "to ensure an equal and consistent approach" to address requests from employees wanting to remain in employment after a normal retirement age.[24] There has been somewhat of a contrasting approach by the courts in relation to consistency for all employees nearing retirement. In *Roche v Complete Bar Solutions*,[25] a compulsory retirement age was found to be a custom and practice in that workplace, and a legitimate aim to create certainty in business planning. The consideration of whether a retirement age was a custom or practice again was a main issue in *Quigley v HSE*.[26] In that case, Mr Justice Gilligan granted an injunction prohibiting the HSE from retiring Dr Quigley. The High Court found that the retirement age of 65 was not "so notorious as to be well known and acquiesced", that it was not a "custom and practice" within the workplace.[27]

On the other hand, the complainants in *Valerie Cox v RTÉ*[28] and *Anne Roper v RTÉ*[29] were both successful in their claims of discrimination on grounds of age when RTÉ attempted to force retirement. This is notwithstanding that the RTÉ Staff Manual set a "normal" retirement age of 65 (but not a "compulsory" retirement age) in both cases. It was not in dispute that the complainants in those cases were aware of that "normal" retirement age. Nevertheless, the test of whether it was a custom or practice in RTÉ to retire employees at 65 was not accepted by the WRC in *Anne Roper*, and it appears it was not even considered by the WRC in *Valerie Cox*. These decisions are inconsistent with the reasoning in *Quigley and Roche*, where the test of whether a retirement age is a custom or practice was heavily considered. Further, the WRC in

the recent case of *Kathleen Dempsey v The West of Ireland Alzheimer Foundation*[30] held that the respondent did not advance reasons relating to why other employees, and not the complainant, were allowed to remain in their employment after the age of 65. In *Anne Roper v RTÉ*,[1] the same approach was taken in one regard; namely, the WRC found that the complainant was treated less favourably because of "several other employees who, when they reached age 65, were permitted to continue working". At the same time, the adjudication officer acknowledged that "most" employees in RTÉ retired at 65 and that "it was unnecessary to refuse a request from one person to remain on longer". The WRC in both of these recent cases found for the complainants on two irreconcilable grounds. In *Dempsey*, the deciding issue was that there were other employees allowed to remain after the normal retirement age. This is contrasted to *Anne Roper*, where a factor considered was that the majority of employees retired at 65 and it was unnecessary to refuse Ms Roper's request. Given that the Code of Practice on Longer Working is advocating for an "equal and consistent" approach for all employees, this reasoning in *Anne Roper* is contradictory to that approach. This underlines the difficulties that adjudicating bodies are facing in balancing the rights of employees and employers in the context of discrimination on the grounds of age.

How far must an employer go?

The requirement for employers to adopt a flexible approach when dealing with compulsory retirement ages has been emphasised at national and EU level. The Government's Roadmap for Pensions Reform 2018-2023 encouraged flexibility for employees in retirement and suggested that if flexibility is not improved for employees, the Government will consider "restricting the capacity to use mandatory retirement provisions relative to the prevailing State pension age".[31] In the Code of Practice on Longer Working, the WRC has gone as far as to state that the duty on employers to ensure flexibility extends to offering an employee nearing retirement less than full hours or an alternative role. The duty of an employer to consider an alternative role was recently addressed in *Sales Advisor v DIY*,[32] where the adjudication officer stated: "The regrettable fact in this case is… that the parties were not minded to sit down and tease out a less absolute alternative to automatic termination at aged 65". This was developed in *Anne Roper*, where the WRC identified other options that RTÉ should have considered, including "assigning [Ms Roper] to a new, temporary assignment for a fixed-term, and in this way, freeing up her job for promotion". The duty of employers to find an alternative position suitable to that particular employee would likely entail an individual assessment to ascertain capacity and capability. This individual approach, however, may be problematic. Recent case law has emphasised the need to uphold the dignity of an older employee by avoiding individual assessments, which may cause embarrassment to that employee.[9] Lady Hale neatly summed up the issue in *Seldon*, where she stated that the legitimate aim of dignity:[7]

"… has been variously put as avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, thus preserving their dignity and avoiding humiliation, and as avoiding the need for costly and divisive disputes about capacity or underperformance".[33]

The Code of Practice on Longer Working also includes the legitimate aim of "personal and professional dignity (avoiding capability issues with older employees)". A significant case that considered the negative effect of individual assessments of employees is *White v Ministry for Justice*,[34] where performance management for the judiciary was held as "not only distasteful and undignified but potentially damaging to the rule of law".[35] Likewise, in *Lindsay v Department of Employment and Learning*,[36] it was held that capability assessments for panel members of the employment tribunals were not an appropriate alternative to a compulsory retirement age "given the time and cost of capability processes, the possibility of litigation, the impact of panel members' dignity, and risks to panel members' independence".[37] An alternative approach was taken in the WRC case of *John O'Brien v PPI Adhesive Products Ltd*,[38] in which the individual capacity of the employee was considered. The adjudication officer highlighted that, although it was "custom and practice" in the company to retire employees at 65, it should have been taken into consideration that the complainant in question was fit and healthy with an unblemished work record. In relation to the duty of employers to carry out individual assessments and performance management, Lady Hale stated in *Seldon:*[7]

"Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce".[39]

It is clear then that employers are under a duty to find an alternative role for an employee in particular circumstances, unless the employer can objectively justify avoiding the need for performance management as a legitimate aim. Employers are in a somewhat difficult position and must engage in a balancing exercise. First, they must enable an employee to remain in work by likely assessing an employee's individual capacity, while keeping the process objective and upholding the dignity of that employee.[9] Any individual assessments of capacity must extend not only to an employee's current role, but also to enabling an employer to find a different role or fewer hours.

Individual needs of the business

Although an employer must assess an individual employee to facilitate a request to remain in work after a normal retirement age, an intriguing paradox is that the opposite approach has been adopted by the courts in relation to assessing the needs of the individual business. The courts have been clear that the objective justification of a compulsory retirement age must not be based on the individual needs of the business. In the case of *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*,[40] the CJEU held:

"By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers".[41]

Grounds advanced by employers must be distinguishable from purely individual reasons particular to the employer's situation.[42]

Intergenerational fairness

The courts' approach to aims offered by employers to justify a compulsory retirement age has not always been consistent. "Intergenerational fairness" was confirmed as a legitimate aim by the UK Supreme Court in *Seldon* and, more recently, in *National*

Union of Rail, Maritime and Transport Workers v Lloyd.[22] In the former case, Lady Hale contended that intergenerational fairness applies to both younger and older workers, as follows:

"[Intergenerational fairness] can mean a variety of things, depending upon the particular circumstances of the employment concerned: for example, it can mean facilitating access to employment by young people; it can mean enabling older people to remain in the workforce; it can mean sharing limited opportunities to work in a particular profession fairly between the generations; it can mean promoting diversity and the interchange of ideas between younger and older workers".[43]

In *Seldon*, Lady Hale described intergenerational fairness as "comparatively uncontroversial".[43] Notwithstanding that description, the determination of the WRC in *Anne Roper* took a novel approach in the interpretation of intergenerational fairness. The WRC acknowledged that Ms Roper's position of producer/director had been filled internally upon her retirement, and this had created a vacancy to younger employees down the line. Nevertheless, the adjudication officer stated that the effect of this was so confined and limited to one department that it was not objectively justified. The adjudication officer stated:

"It seems to me that her departure may have facilitated the temporary alleviation of disgruntlement, but as a method of achieving intergenerational fairness, it fell considerably short".

This is, respectfully, setting a bar too high for employers in fulfilling their duties in relation to compulsory retirement ages. The adjudication officer rejected the argument put forward by RTÉ that the court should follow the leading decisions in the area of the CJEU, namely *Palacios De La Villa v Cortefiel Servicios*[44] and *Fuchs and Köhler v Land Hessen*.[45]

In *Palacios*, the CJEU held that "legitimate employment policy, labour market and vocational training objectives" can be regarded as a legitimate aim that can objectively justify a mandatory retirement age. The WRC in *Anne Roper* rejected the arguments of RTÉ that *Palacios* was comparable to Ireland, and held that this case did "not reflect the circumstances of the complainant and the respondent, where her retirement resulted in the promotion of just one individual in one organisation, in a country where unemployment is relatively low".

Similarly, the WRC held that the case of *Fuchs and Köhler* did not apply because it concerned the retirement of judges in Germany, which were an "identifiable group of worker", namely judges.

The adjudication officer stated that both of these CJEU cases were decided on the specific facts relating to the countries in question, namely Spain and Germany. This is a new departure within this jurisdiction and many employers will be anxiously awaiting the appeal at the Labour Court, as it could have far-reaching consequences for their businesses.

Conclusion

It is respectfully suggested that the WRC decisions of *Valerie Cox* and *Anne Roper* have made it increasingly difficult for employers to ascertain whether a customary retirement age within an organisation will survive a discrimination claim on grounds of age. At a time when employers now have a wide range of duties towards older workers, further clarity in this area would be most welcome.[46]

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1. ADJ-00019084; December 18, 2019.
2. A hearing date has not been assigned for this appeal.
3. Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order of 2017 (S.I. 600 of 2017).
4. *Nano Nagle School v Daly* [2019] 30 E.L.R. 221; para. 106.
5. More recently, the WRC confirmed that from January to June 2019 the most frequent complaint related to equality was age at 31%.
6. *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16; para. 2.
7. [2012] UKSC 16.
8. Para. 15.
9. Blackham, A. Interrogating the 'dignity' argument for mandatory retirement: an undignified development? *Industrial Law Journal* 2019; (48) (3): 377.
10. Joined cases C-585/18, C-624/18 and C-635/18.
11. Zelazna, E. The Rule of Law Crisis Deepens in Poland after *A.K. v Krajowa Rada Sadownictwa* and *CP, DO v Sad Najwyzszy*. European Papers. European Forum, January 12, 2020, pp. 1-6.
12. European Commission's 2012 White Paper.
13. European Foundation for the Improvement of Living and Working Conditions (Eurofound).
14. Ibid.
15. Section 1 of the 2004 Act.
16. Regan, M. and Murphy, A. *Employment Law*. Dublin: Bloomsbury Professional, 2017; paras. 17.200-17.265.
17. Council Directive 2000/78/EC of November 27, 2000 establishing a general framework for equal treatment in employment and occupation; Art. 2.
18. See Re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996.
19. See also Recitals 14 and 23.
20. ADJ-00023576; February 5, 2020.
21. [2008] IEHC 467.
22. [2019] IRLR 897.
23. Para. 49.
24. P.7.
25. DAC-E2013-197.
26. [2018] 29 E.L.R. 204.
27. Para. 37.
28. ADJ-00006972; March 26, 2018.
29. ADJ-00019084; December 18, 2019.
30. ADJ-00014857; October 15, 2019.
31. P. 38.
32. ADJ-00013899; May 20, 2019.
33. Para. 57.
34. [2014] UKET 2201298/2013.
35. Para. 45.
36. [2013] NIET 356/12.
37. P. 16.
38. ADJ-00009914; August 10, 2018.
30. Para. 61.
40. [2009] IRLR 37.
41. Para. 46.
42. *Fuchs v Land Hessen*, C-159/10 and C-160/10; [2011] IRLR 104; para. 52.
43. Para. 56.
44. SA441/05.
45. Joined cases C-159/10 and C-160/10 [2011] ECR I-6919.
46. See Age Action, Briefing Paper 1 on 'Abolishing mandatory retirement', 2016.

Underfunded justice


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The Legal Aid Board is currently celebrating its 40th anniversary. Its establishment is rooted in the Pringle Report of 1977 and the seminal judgment of the European Court of Human Rights (ECHR) in *Airey v Ireland* in 1979, which deemed Ireland's failure to facilitate effective access to court to enable the applicant to obtain a judicial separation a breach of Article 6 of the European Convention of Human Rights and Fundamental Freedoms: the right to a fair trial. A right to civil legal aid in complex cases was recognised by the Court and it soon followed that the institution of a Civil Legal Aid Scheme was essential if Ireland was to guarantee litigants, particularly those of limited means, effective access before the courts.

Since its establishment the Legal Aid Board has been providing a very valuable and necessary service; however, over the years, legal practitioners engaged by the Board have experienced a number of difficulties across the operation of the Scheme, giving rise to a serious concern that the existing system cannot adequately protect the rights of individuals seeking to assert, protect and vindicate their legal rights.

Need for improvements

It is widely acknowledged that improvements are needed in terms of eligibility for access to legal aid. The current income threshold, €18,000, is impractical, and the exclusion of many areas of law leaves vulnerable groups and individuals with little recourse. Members of the legal profession, and organisations such as FLAC and Community Law & Mediation (CLM), strive to address this deficit, but ultimately the Government must address the fundamental inadequacies of the Scheme. In its Report on Reform of the Family Law System (October 2019), the Joint Committee on Justice and Equality recommended that "a full review of the legal aid scheme be conducted, with particular regard to means test rates, contribution requirements and eligibility, in order to ensure that the scheme is meeting the needs of those most vulnerable in society". However, reform of the eligibility criteria will not, in itself, ensure access to justice. A person who qualifies for legal aid potentially faces up to 58 weeks before they can see a solicitor. This is particularly concerning in the area of family and childcare law, which are the predominant areas in which the Board provides services. The longer disputes of this nature go unresolved, the more likely that an already stressful and volatile situation will be heightened.

Skills and expertise

The demands on the Scheme are further compounded by increasingly complex litigation. The fees prescribed for barristers undertaking civil legal aid work are wholly inadequate and do not reflect the level of work, expertise, and complexity involved. For many practitioners it has become unviable to continue to participate in the Scheme. This creates a real concern regarding an emerging dearth of experienced barristers on the Board's panels. The expertise required to advise and advocate in family and childcare law is of a specialised nature and there is a strong public interest in ensuring that the best advocates are attracted to practise in these areas.

The specialist skills, knowledge and experience of a range of other professionals are also vital to family law proceedings, particularly in giving effect to Article 42A of the Constitution, which prescribes a right to every child to have their views heard in judicial proceedings that affect them. The Child and Family Relationships Act 2015 requires the court to consider a series of factors in determining the best interests of the child and these necessitate the input of suitably qualified experts. In circumstances where one party is legally aided, the Board will discharge 50% of the cost for that person. It is then up to the non-legally aided individual to discharge their half of the report. Where neither party is legally aided, this leads to a real difficulty where the availability of this service to children will be dependent on their parents being able to afford the cost. This is contributing to the development of a two-tier system of family justice, whereby giving full effect to the constitutional right of the child for his/her voice to be heard is the preserve of the better off.

The economic argument

The procurement of necessary expertise by the Legal Aid Board to ensure effective access to justice necessitates adequate funding. An enhanced civil legal aid system, however, competes in a finite pool of public resources, and legal aid does not feature as high on the political agenda as other priority issues such as health and housing.

Never before has there been greater demand on public spending, as the Government takes every fiscal measure necessary, and rightly so, to deal with the devastating impact of Covid-19. However, the pandemic is going to have a severe impact on people's lives and it is inevitable that the demand for legal aid will increase further in the coming weeks and months. With unemployment levels on the rise, more and more people will become eligible for legal aid, and access to justice will become even more pertinent, as citizens seek to assert, protect and vindicate rights that may have been adversely affected by the crisis.

There are strong economic arguments to support investment in legal aid. A recent World Bank report, in collaboration with the International Bar Association (September 2019), notes that the failure to address the justice gap through legal aid can be "a false economy, as the costs of unresolved problems shift to other areas of government spending such as health care, housing, child protection, and incarceration… Studies find significant net economic benefits [as a result of public investment in legal aid], even in the short term, including immediate benefits to clients and cost-savings to governments".

The report demonstrates that the provision of an efficient, well-resourced legal aid service can help to maximise positive outcomes for clients and decrease cycles of disadvantage, while alleviating pressures on other areas of public expenditure and contributing to the wider economy. At times of budgetary constraints and fiscal emergency, with policy-makers under increasing pressure to justify public expenditure and demonstrate evidenced-based decision-making, a cost–benefit analysis of legal aid is a prudent approach.

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