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Private versus professional life – what are the boundaries?

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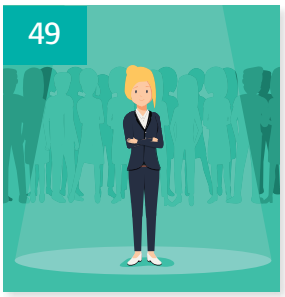

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Planning for a post-Covid justice system

As the summer term begins, it is heartening to see movement towards strategic planning in the Courts Service to ease the significant backlog created by restrictions.

Now that the Easter vacation is over, with the commencement of the new term springs new "hope", with criminal trials up and running, and Dublin Civil Circuit sittings scheduled for this term. It is also reassuring to see that the roll-out of the vaccination programme is picking up pace, along with a downward trend in the number of positive cases being reported. I hope that this renewed sense of positivity will continue, and that we can all get back to work and hopefully meet each other, in person, later this year.

Courts Service in transition

Marking the one year anniversary of Covid-19 restrictions, The Bar of Ireland held a dedicated CPD event regarding the operations of the courts, which allowed members to hear directly from, and engage directly with, the judiciary and the Courts Service on operational issues affecting High and Circuit Court jurisdictions, both civil and criminal. The remote event was attended by in excess of 300 members during which a number of salient points came to the fore, in particular the need for increased resourcing to deal with the longer-term impacts on access to justice. We all learned that with over 1,100 staff, 180 judges and almost 25,000 court hearings, the Courts Service employs only 11 dedicated ICT staff – akin to "taking a nut to the sledgehammer". In a post-Covid court system, it is vital that in-person and hybrid hearings are adequately supported. By logical extension this includes judicial resources, and we heard the President of the High Court, Ms Justice Irvine, outline the urgent need for up to 20 additional High Court judges in order to deal with the backlogs and incoming matters. No assessment of the requirement for additional Circuit or District Court judges was addressed. The Bar of Ireland eagerly welcomes the response of the judiciary and the Courts Service, which it would appear has now shifted to a proactive and strategic planning stance. Hopefully we are all moving to the end of the restrictions, or at the very least to an easing of same. It is therefore essential that engagement from members continues in a pro-active way, as court activity begins to increase.

PI Guidelines

The recent (enactment and) publication of the new Personal Injuries Guidelines marks an important development in personal injuries law. At a recent Bar of Ireland tort CPD event, chaired by Mr Justice Kevin Cross, his insight in recounting the various changes that have impacted the PI Bar since the 1970s was helpful in putting into context what will inevitably be a further professional adjustment. He remarked that despite all the changes that have taken place over the last 50 years, there still remains a strong PI Bar, and he believes that will continue to be the case. The recording of the tort CPD event is available for members to view on the website.

Stay safe

Finally, I would remind each of you to please remain vigilant in relation to the Covid-19 protocols in our workplace to protect both members and our staff:

- please wear your masks;
- please wash your hands;
- please keep your social distance;
- please work from home where possible; and,
- please do not congregate in large numbers.

I wish everyone health and success in this new term.
Please stay safe.

Maura McNally SC
Senior Counsel, Barrister
– Member of the Inner Bar
Chair of the Council of
The Bar of Ireland

Personal and political

Articles in this edition look at the continuing legal fallout from Brexit, and recent case law on the boundaries between private and professional life.

As the ramifications of Brexit continue to reverberate through political and economic life, lawyers must also grapple with the technical impacts on cross-border litigation. The legal instruments that previously governed jurisdiction and enforcement of judgments in relation to the UK no longer have legal effect, making litigation between EU member states and Britain more costly and time-consuming. Our author sets out the principles that must now be applied in this complex area of law.

An unavoidable consequence of all-pervasive social media and video surveillance is the increasing blurring of the boundary between private and professional life.

Most professionals would hope to have a significant degree of privacy in relation to the conduct of their personal life. In this regard, some comfort can be gleaned from the recent UK High Court decision of *Beckwith v Solicitors Regulatory Authority*. This case supports the view that when assessing the conduct of professionals, regulatory bodies should be careful to draw a definitive line between acts that reflect on the performance of work duties and those carried out in a purely social context.

Lord Sumption has become an outspoken public commentator in the wake of his retirement from the UK Supreme Court. As he launches his latest book, *Law in a Time of Crisis*, he shares his often controversial opinions in an interview with *The Bar Review*.

Finally, in our closing argument, we note the recent adoption of the new Personal Injuries Guidelines by the Judicial Council. It is our fervent hope that they will result in a meaningful reduction in insurance premiums.

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

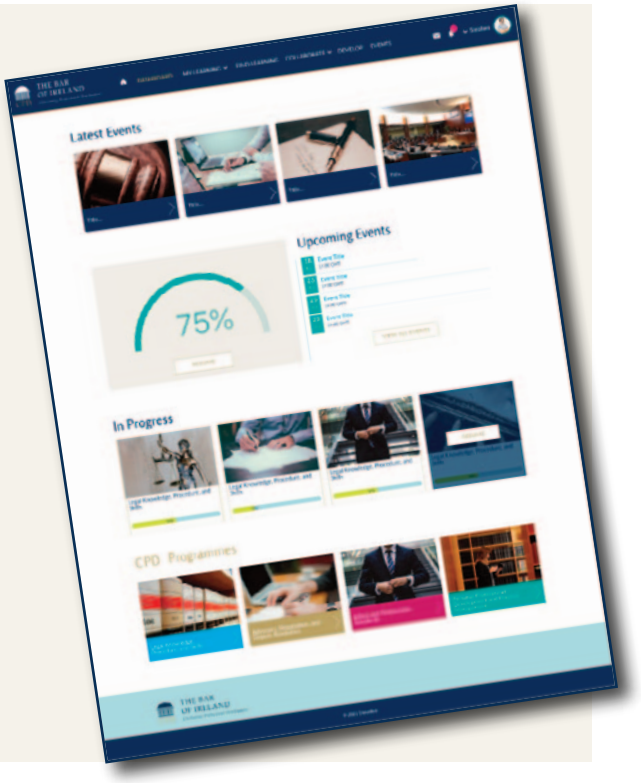
New online CPD platform coming soon!

The demand for online continuing professional development (CPD) activities continues to grow, with over 1,700 members having engaged in an online activity over the past 12 months. In recognition of this,

The Bar of Ireland is developing a new learning management system, cpd.lawlibrary.ie, to expand on its online CPD offering. Features of the new platform will include:

- support for a diverse range of online learning activities that will enable the CPD team to create multi-activity courses and more interactive learning opportunities;
- automatic storage of your Bar of Ireland CPD activities (both in person and online) in one place, to make CPD compliance easier to manage;
- a facility to record details of CPD activities completed with other providers;
- improved search functionality for CPD playback to make it easier find activities relevant to you; and,
- full support for the requirements of the new CPD scheme commencing from October 2021.

The online platform will be launched in May 2021.



Look into Law online

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65 MEMBERS OF THE BAR OF IRELAND

TWO SOLICITORS

FOUR MEMBERS OF KING'S INNS STAFF

ONE MEMBER OF AN GARDA SÍOCHÁNA

SEVEN MEMBERS OF THE BAR OF IRELAND EXECUTIVE STAFF

48 VIDEOS

24 QUIZZES WITH 181 QUESTIONS

This may have been the first online Look into Law Transition Year (TY) Programme offered by The Bar of Ireland, but the overwhelming success and positive reaction means it will definitely not be the last!

When it became obvious that the Bar could not offer the traditional Look into Law programme due to Covid-19, a sub-committee from the Education & Training Committee met to assist the executive staff to create an online programme. Following this a focus group was organised with a number of TY Co-ordinators from around the country to assist with creating a programme that would suit schools and students.

As a result of this focus group, and in light of a continuing uncertain situation with Covid-19 restrictions, the programme was deliberately designed to be as flexible as possible, allowing an unlimited number of students to take the programme, whether in a classroom led by a teacher, or at home in the evening. This was a fortuitous decision, given that TY students did not in fact return to in-person teaching in January, so it allowed teachers the choice of allowing students to work through the programme alone or within an online class via Teams or Zoom.

To date, over 400 schools have signed up, of which 70 are DEIS schools, with 12,000 students registered, which represents about one-quarter of all TY students in the country. The recent RTÉ coverage resulted in a significant interest from students and schools who had not previously signed up, so the deadline for applications was extended.

The entire programme was created using Articulate360, an elearning platform, and each of the five modules had a different theme with a combination of videos, quizzes, links and reflections in each one. Each module takes students at least two hours to complete with approximately 11 hours of content overall. In addition, schools have been given a mock trial casefile and the option to run a mock trial within the school where possible.

This programme could not have been created without the generosity of the barristers and invited guests who agreed to give up their time and be recorded for the programme, nor could it have been created without the assistance of the barristers who suggested content and structure.

Creating this online programme necessitated a significant time commitment, from programme design, recruitment of people willing to be recorded, recording of the video, and creation of quiz questions, to uploading everything to the platform and checking everything before it went live. This is in addition to the many emails to schools answering various questions. However, it was with the knowledge that it can be used again in the future and, crucially, it allowed the Bar's outreach programme to be accessed by so many more students, many of whom will not be interested in a career in law, but will now have gained an insight into life at the Bar and the justice system. A comment from Cork on the interactive noticeboard that accompanied the programme sums it all up: "I loved hearing everyone's stories and about their day-to-day life. This is probably my favourite experience of TY so far".

EBA Spring Series: The Future of Work

The world of work is changing rapidly. Digital technologies and artificial intelligence are transforming the workplace – arguably altering the very nature of the employment relationship itself. Many of these changes seem likely to be accelerated by the experience of the last year. This is therefore a good time to reflect on the world of work, how it has changed, how it is likely to change in the future, and what kinds of laws, strategies and policies are needed to protect employees, while at the same time fostering innovation and economic progress. We also need to understand some of the wider economic and societal changes that may follow the pandemic crisis, including the enhanced role of the State, how to fund vital public services such as health, and how to address the overarching challenge of climate change.

With all of this in mind, the Employment Bar Association (EBA) ran the first in the series of webinars on Thursday, March 18.

Speakers included: Leo Varadkar TD, Tánaiste and Minister for Enterprise, Trade and Employment; Aislinn Kelly-Lyth, University of Oxford (Algorithms and Employment Law); Shana Cohen, Director of TASC (Think-tank for Action on Social Change); and, Danny McCoy, CEO of Ibec (Irish Business and Employers Federation). The webinar was chaired by Alex White SC, Chair, EBA.

The next webinar takes place at 2.00pm on April 29. Please visit www.employmentbar.ie to register.

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All lectures and workshops are webcast and available to view on playback, allowing participants to catch up on coursework at a time suitable to their own needs. Diploma Centre reserves the right to change the courses that may be offered and course prices may be subject to change.

A chance to make a difference

Gemma McLoughlin-Burke BL describes her work as the ICCL and Bar of Ireland Procedural Rights (Criminal Justice) Fellow.

Gemma McLoughlin-Burke BL

The Irish Council for Civil Liberties (ICCL) has long been a leading human rights organisation in Ireland and one that has fought for both legal and social change, from criminal justice reform to campaigning for repeal of the 8th Amendment to the Constitution.

Many new entrants to the Bar have a long-term goal to get involved in the type of human rights and legal reform work being carried out by the ICCL. In 2019, the ICCL launched its Procedural Rights Fellowship in conjunction with The Bar of Ireland, giving young practitioners an opportunity to get involved in this work early on. The nine-month Fellowship seeks applicants between their first and third years at the Bar who intend to practise in the area of crime.

I was initially drawn to the prospect of working alongside the ICCL as it focuses on the side of law that is usually only explored by academics, that being reform and improvement of the legal system. I completed my undergraduate degree in DCU and was lectured by Prof. Yvonne Daly, who specialises in evidence and procedural rights. I was also a member of DCU's Free Legal Advice Centre Committee, where I saw first hand the lack of awareness that many people have of their own rights. I have volunteered for many years with young people who come from low socio-economic backgrounds. Although I am now privileged enough to have come through the Inns and be a member of the Law Library, I come from a background similar to many of these young people and am familiar with the legal barriers that are prevalent within these communities, such as a lack of access to justice, lack of knowledge of rights and entitlements, and difficulties with inconsistent and inadequate standards of policing.

Having previously carried out small research tasks for the ICCL on a voluntary basis, I was aware of the organisation and the work it carries out in the protection and promotion of constitutional and human rights.

Since taking up the Fellowship a short few months ago, I have had the opportunity to work on a number of exciting projects. Aside from attending meetings and educational seminars, which enhance my awareness of the relevant areas of focus for the ICCL, I have been designated tasks of my own. The primary focus of the Fellowship is on procedural rights; however, I am invited to become involved in any projects in which I have an interest. The Fellowship roughly equates to two working days per week but the team is very flexible and do everything they can to facilitate my often chaotic schedule!

So far, I have assisted with the Irish contribution to the EU Rule of Law Report, looking at a variety of areas such as independence of the judiciary, access to justice, legal aid and developments in journalistic privilege. I also assisted in drafting a submission on the Judicial Appointments Commission Bill 2020, in which the ICCL called for a more transparent and merit-based system of judicial appointments that reflects international standards.

At present, I am drafting a submission to the Review Group on the Offences Against the State Act 1939. I was particularly eager to get involved in this as I spent much of Michaelmas in the Special Criminal Court – an alarmingly eye-opening experience! I will also be involved in advancing a programme of research, policy and advocacy work in the area of criminal justice procedural rights.

Although the thought of additional work during the first few years at the Bar when you may be devilling seems daunting, the work is interesting and immensely worthwhile. I am lucky enough to be devilling with Tony McGillicuddy – a man who knows all there is to know about criminal law and the land of Kerry – who is a wonderful, encouraging mentor and helps me to balance my work for him with my work for the ICCL. The ICCL Fellowship is an excellent opportunity for any young barrister and the work carried out with the ICCL has the potential to effect real and lasting change. I would strongly encourage anyone who has an interest in criminal justice and human rights to apply for the next fellowship.

International Women's Day 2021

In celebration of International Women's Day 2021, The Bar of Ireland was delighted to be joined by The Rt Hon. the Baroness Hale of Richmond DBE, Former President of the UK Supreme Court, as our special guest speaker.

In a virtual 'fire-side' chat with Emer Woodfull BL, 230 barristers, solicitors and members of the wider legal community heard Baroness Hale reflect on her early years and her many achievements. A woman of many firsts – the first woman to work at the Law Commission of England and Wales, and the first female President of the UK Supreme Court – she spoke about the importance of equality and diversity, and how important it is that people from all backgrounds are represented on the bench, stating that greater diversity in the judiciary leads to better decision-making. Her remarkable career and her wise words proved to be a source of great inspiration to the many attendees, and no doubt we all look forward to reading her memoirs, a project she says has kept her busy throughout lockdown.

Justice Week 2021

Justice Week intervarsity debate

In March, The Bar of Ireland held its second annual Justice Week – a joint awareness campaign of the legal professions across the four jurisdictions (Scotland, Northern Ireland, Ireland, and England and Wales). The campaign aims to promote an awareness and understanding of access to justice and the rule of law. This year, the focus of Justice Week was the impact that Covid-19 has had on citizens' rights and the administration of justice, with particular emphasis on the important role that the rule of law and the justice system play in responding effectively to a public health crisis. Each day of the week held a distinct theme, and utilising our social media and online events platforms, The Bar of Ireland brought a series of virtual events, podcasts, and interviews to as wide an audience as possible. 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 events held was an intervarsity debate comprising eight students from eight different university law schools around the country. Chaired by Shauna Colgan BL, the motion for debate was: 'This House Believes That the Right to Offend, Shock and Disturb is Necessary in a Democratic Society'.

The debate presented a wonderful opportunity for students, particularly those considering a career as a barrister, to hone their advocacy skills in front of an esteemed judging panel comprising Mr Justice Seamus Noonan, Mr Justice Maurice Collins, Ms Justice Nuala Butler, and Maura McNally SC, Chair of the Council of The Bar of Ireland, and an audience of over 120 people. Showcasing excellent debating skills were Chloe Feighery (TU Dublin), Roisin Madden (DCU), Matthew Mulrooney (NUIG) and Eoin Jackson (TCD) of Team A, the proposition, and Rachel Deasy (UCC), Oisin Magfhogartaigh (UCD), Cameron Moss (MU) and Eoin McGloin (UL) of Team B, the opposition.

After difficult deliberation, Mr Justice Seamus Noonan announced Team B, the opposition, as the winners of the debate. He commended the high standard from both teams saying that he was "spellbound by the quality of the speakers". The Bar of Ireland expresses its deep gratitude to everyone who took part in this year's debate and we look forward to the debate becoming an annual fixture in our legal diary.

Justice Week 2021 panel discussion: understanding disinformation

As part of Justice Week, The Bar of Ireland was delighted to host a panel discussion on the topic of disinformation. Joining the panel were Mark Little, CEO of Kinzen, Sunniva McDonagh SC, Vice-Chairperson of the Fundamental Rights Agency, and Pierre Francois Docquir, Head of the Media Freedom Programme of ARTICLE 19. The virtual event was chaired by Sorcha Pollak, *Irish Times* journalist and author. Among the issues discussed were disinformation in a pandemic, disinformation in autocratic societies, anti-lockdown protests, and social media algorithms that can promote and spread disinformation.

The panel discussed the role and responsibility of social media giants and called for disinformation to be tackled at an international level, suggesting a legal and regulatory framework that allows and enables the development of a pluralistic and free media landscape, while filtering out the harm caused by disinformation.

The event was hugely popular, and was attended by over 140 people, resulting in a lively Q&A. The Bar of Ireland is immensely grateful to the panelists for their time and for sharing their insights and expertise on what is an extremely topical issue, and to Sorcha Pollak for guiding the discussion.

New pensions directive being implemented

Donal Coyne of Mercer (formerly JLT Financial Planning Ltd), which manages The Bar of Ireland Retirement Trust Scheme, explains that while significantly greater governance of pensions will apply in Ireland shortly, members of the Scheme can be assured that Scheme trustees will ensure that it meets all of the compliance requirements of the new EU Directive.

It's probably fair to say that the Institutions for Occupational Retirement Provision Directive (IORP II) represents the biggest change to the pensions regulatory landscape in Ireland for more than 30 years.

Transposition is long overdue and Ireland is now the only EU member state yet to have transposed the Directive. However, indications are that transposing legislation will arrive in the first half of 2021. As a precursor to this, the Pensions Authority has clearly signalled the direction of travel by increasing its engagement with and scrutiny of pension schemes in Ireland in recent months.

Regardless of when the Directive is implemented, the truth is that schemes can't afford to wait any longer – sponsors and trustees must take action now to ensure that they understand the extent of what's coming and take the necessary steps to prepare.

We want to reassure all members of The Bar of Ireland Retirement Trust Scheme that the trustees will ensure implementation of the necessary steps to meet all of the requirements of the IORP II Directive. For those of you with a deeper interest, here are some of the details of the new requirements.

A focus on governance

There are clearly a lot of different areas of focus in the Directive, but by far the most important are the new requirements that schemes have "effective" governance and internal control arrangements in place. At the very least this will include requirements to:

- appoint key function holders in the areas of risk management, internal audit, and for defined benefit schemes – actuarial, and to develop a tailored and proportionate risk management system with Own-Risk Assessments carried out at regular intervals;
- to adopt an appropriate internal control system, which will have to address areas such as asset custody and security, how transactions are approved and implemented, how data is kept secure, and how financial records are kept – all subject to what the Authority terms "a robust and independent internal audit process"; and,
- to ensure that all persons involved in the running of the scheme, including trustees and other key function holders, meet prescribed fitness and probity, and knowledge and understanding standards, placing greater focus on how various functions are outsourced, i.e., whether they are carried out in house or whether they pass off to third parties, and how outsourced providers are selected and monitored.

All of this will need to be underpinned by a body of prescribed written policies and procedures covering all significant areas of scheme activity.

Trustees will also be exposed to far greater scrutiny and accountability. The Pensions Authority will be fundamentally changing its approach to supervising pension schemes, adopting a more forward-looking, risk-based strategy.

For The Bar of Ireland Retirement Trust Scheme, the trustees will ensure that the provisions of the new Directive are implemented in full.

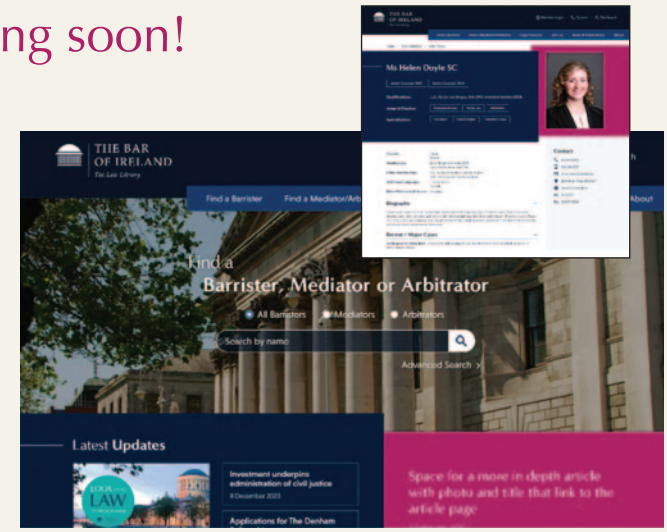
These are really interesting times for the pensions industry. When the regulations and Pensions Authority guidance are eventually published, there will be a significant ramping up of activity to get up to speed with precisely what will be required. Barristers, though, can be assured that their Scheme will be fully compliant.

Public website relaunch... coming soon!

Did you know that the 'Find a barrister, mediator or arbitrator' function is the most visited section on The Bar of Ireland website? This section will now be front and centre once the new website is relaunched. This gives members an opportunity to promote themselves more effectively and efficiently, with new expanded profiles.

Once available, we encourage members to use the functionality of the new website to its fullest, as it best represents you, your skills and your practice. Please review your profile and ensure that it is up to date before we launch.

You can update your details directly via memberservices@lawlibrary.ie or through this form.



Child diversion in Malawi: Mwai Wosinthika

Lindiwe Sibande
IRLI Programme Officer

The Covid-19 pandemic has brought to the fore the unique challenges faced by children in low-income countries such as Malawi and how these challenges are intensified for children in conflict with the law. Alternative justice options for children in conflict with the law are both extremely scarce and underfunded in the country. Particularly at pre-arrest and pre-detention stages, these resources are mainly available through non-profit organisations such as youth-centred vocational programmes and other youth empowerment initiatives. Supported by The Bar of Ireland, Irish Rule of Law International's (IRLI) Mwai Wosinthika programme in Lilongwe (central region) is a 12-session, pre-trial diversion programme facilitated in collaboration with the Malawi Ministry of Gender and other partner agencies, and offers support and guidance for young people who have come into conflict with the law. Child protection officers from the Ministry of Gender take the children through different topics aimed at supporting and empowering them to change their circumstances, pursue their goals, and make positive and informed choices. As a part of IRLI's commitment to ensure the success of the children beyond the programme, we further monitor the children's sustained change through home counselling visits that span three months, six months, and one year after the children have completed the programme. Due to potential health risks in running group sessions during the pandemic, home counselling visits have been intensified in order to continue meeting the needs of the children. IRLI also works with other partner agencies in order to link the children to additional vocational and educational opportunities, as well as sexual and reproductive health resources. Mwai Wosinthika is currently one of the few diversion programmes in the country that follow a non-detention route. With normal intake usually around 15-25 children per programme and current intake limited to 10-12 due to Covid-19 restrictions, this leaves the resource space for children in conflict with law more wanting than usual. Disruptions in the normal operation of programmes due to Covid-19 have further widened this gap. We would actively encourage those interested in the work of IRLI to follow us on LinkedIn, Twitter, Facebook, and Instagram. If you would like to donate to IRLI you can obtain details on doing so on our webpage – www.irishruleoflaw.ie. Furthermore, opportunities to work for or volunteer with IRLI will be advertised on those platforms. If you require any information about IRLI or its work, please contact us on info@irishruleoflaw.ie or via our social media platforms.

Third-party cover

Under the Consumer Insurance Contracts Act 2019, third parties can now pursue insurers directly where no privity of contract exists.[1]

Keivon Sotoodeh BL

Prior to the commencement of the Consumer Insurance Contracts Act[2] (the 2019 Act), the Civil Liability Act 1961 (the CLA) provided a limited statutory regime permitting a third party to sue an insurer directly in circumstances where no privity of contract existed between the plaintiff and insurer. This system was unfavourable and capable of producing unjust results – an issue discussed further below.

However, Sections 21 and 22 of the 2019 Act now make it possible for a third party to sue an insurer directly, notwithstanding that no privity of

contract exists between them. In order to explain the significance of this legislative development, it is proposed to first examine the previous position in Ireland governed by the CLA and the limitations of that regime, before analysing the changes introduced by the 2019 Act.

I will then compare the 2019 Act with the system in England and Wales under s.2 of the Third Parties (Rights Against the Insurers) Act 2010 (the 2010 Act) before examining the practical implications of the 2019 Act for Irish practitioners.

Previous position in Ireland and limitations under Section 62 of the Civil Liability Act 1961

Under the previous Irish system, a third party's right to pursue an insurer directly was primarily contained in s.62 of the CLA[3] and arose where an insured party had either died or been declared bankrupt, or a company[4]/partnership had either 'wound up' or been 'dissolved'. In such circumstances, any money that was payable to the insured under a policy of insurance could only be used for the purpose of paying out a valid claim in full and was not considered "assets of the insured" or applied to the payment of debts of the insured in the bankruptcy, the administration of the estate or the winding-up/dissolution.

Buckley[5] states that there have been a number of critics in relation to the previous position in Ireland in that "the rule prevents effects being given to the intention of the contracting parties … the exceptions to the rule render the law complex and uncertain [and] the rule causes difficulty in commercial life".

The limitations contained in s.62 CLA are best illustrated by the case law of the Superior Courts. In *Hu v Duleek Formwork Ltd*,[6] the plaintiff obtained judgment in default of appearance against an insured. When the plaintiff was informed that the insurer was trying to deny cover based upon the breach of a condition precedent, they successfully applied to join the insured's insurer as a co-defendant to the proceedings.

The insurer then applied to strike out the proceedings instituted against it, which application was ultimately successful. Peart J. held that he was not aware of any case that established an insurer had "a duty of care" between themselves and a third party against their "insured". He held that "[i]t would not be right in the present case in such circumstances to extend the law that far". Peart J. acceded to the insurer's application "with sympathy for the plaintiff and therefore with regret… on the basis that they disclose[d] no reasonable cause of action against the [insurer]".[7]

This case is an example of the injustice caused whereby a plaintiff lost out on compensation to which they might otherwise be entitled by reason of the fact that the third party had no privity to the insurance policy. This was so notwithstanding that the plaintiff was in a position to pay the excess due and owing under the policy.

Similarly, in *Murphy v Allianz PLC*,[8] Gilligan J. emphasised that there existed "no privity of contract between the defendant and the plaintiff … and the defendant owes no duty at law under contract, statute or in tort to the plaintiff such as might give rise to a claim against it in damages".[9]

As a result of this line of case law, a third party who may have suffered injury would have no form of redress due to the simple fact that they themselves were not a party to the insurance policy and, further, the insurer owed them no duty of care.

There was also confusion as to the correct procedural steps that needed to be taken by a plaintiff seeking to rely on s.62 of the CLA. Jennings, Scannell and Sheehan note that there may be a requirement to seek authorisation from the Personal Injuries Assessment Board (PIAB) if the matter relates to a personal injury action and if an insurer is added as a co-defendant.[10] However, In *McCarron v Modern Timber Homes Limited*,[11] Kearns P. held that an insured's liabilities to third parties under an insurance policy do not arise until "the existence and amount of his liability to the third party is first established either by action, arbitration or agreement, and that a valid claim cannot be so characterised until liability has been established against the employer and the quantum of the claim assessed".[12] This suggests that an application under s.62 of the CLA would be made after the liability of the insured has been established, by which stage no further claim for damages in personal injuries is sought and the proceedings are closer in character to that of a liquidated debt claim.[13]

More recently, s.62 of the CLA was considered in the case of *Moloney and Cashel Taverns Ltd v Liberty Insurance DAC*.[14] Heslin J. had to consider whether an insurer could decline to indemnify their insured due to the late notification of a claim, notwithstanding that this would, in effect, defeat the plaintiff's recovery of monies in respect of their claim against the insured. The Court held that the insurer was indeed entitled to refuse indemnity on this basis and that the "plaintiff [had] no entitlement to recover" from the insurer.[15]

This case is an example of the injustice caused whereby a plaintiff lost out on compensation to which they might otherwise be entitled by reason of the fact that the third party had no privity to the insurance policy. This was so notwithstanding that the plaintiff was in a position to pay the excess due and owing under the policy.

How the 2019 Act has changed the position

Under the 2019 Act, a third party is entitled to pursue an insurer directly and it is not necessary for the liability of the insured to be first established by way of separate proceedings. The terms contained in the policy can "be enforced against the insurer in the proceedings" once the liability of the insured has been established, notwithstanding the absence of privity between the injured party and the insured.[16] Liability can be established "if its existence and amount are established" by way of a declaration under the 2019 Act, or, in the alternative following a judgment/decree, an arbitral award, or "an enforceable agreement".[17]

Where a policy is taken out by an insured against a possible third-party liability (and such a liability arises), then where either the insured has passed away or cannot be located, or is insolvent, or a court finds it just

and equitable to do so, the Court can transfer the rights of the insured under the policy to the third party to whom the liability is owed.[18] In such circumstances, a third party[19] can seek to recuperate any loss that said party suffered that is covered by the terms of the policy.[20]

Further, where a third party "reasonably believes" that such a policy exists, they are entitled to request information from relevant persons who can provide same in relation to: (i) the contract itself and the coverage it provides; (ii) the insurance provider; (iii) the provisions contained in the said contract; and, (iv) information relating to the insurance provider's intent to refuse to accept coverage.[21]

Another important change is that if a third party decides to directly pursue the insurer and a term or condition exists that the insured is required to fulfil as a condition precedent under the policy (for example to pay an excess), the third party may now step into the shoes of the insured and fulfil the condition precedent, which thereby renders the condition precedent fulfilled.[22] The insurer, however, is able to rely upon the "same defences" as the insured itself.[23] In addition, "the insurer shall be entitled to set off any liabilities incurred by the person in favour of the insurer against any liability owed by the insurer to the third party".[24]

The 2019 Act specifically provides that where the insured has "died" or "cannot be found"[25] a term that the insured must "provide information or assistance to the insurer if that term cannot be fulfilled" may not be invoked against the third party, nor may a provision that requires the notification of a claim as a condition of coverage.[26]

In the interests of reducing legal costs, an insurer may decide whether it wishes to have the issue of coverage determined before the main trial.

Under the 2019 Act, a third party is not required to first establish the insured's liability by way of proceedings, or otherwise, in order to rely upon the direct right of action against the insurer.[27] A third party is permitted to bring an action directly against the insurer[28] for declaratory relief in relation to the insured's liability or potential liability to the said third party.[29] The insurer can rely upon any defence that would have been available to the insured in such circumstances as if the insurer was the insured itself.[30]

Where declaratory relief is granted by a court, the effect is that the insurer is liable to the third party and the court may proceed to give the appropriate judgment against the insurer.[31] In addition, where declaratory relief is sought in relation to the insured's liability, rather than their potential liability, the insured may be added as a defendant to such proceedings.[32] In such a case, the insured is also bound by any declaration made.[33]

Further, it is not necessary that the third party existed at the time the contract of insurance was entered into in order to avail of the direct right of action.[34] Where two third parties are wronged by reason of an insured event and damages exceed the threshold of cover in place, the 2019 Act provides that damages payable under the policy "shall be reduced to the appropriate proportionate part of the sum insured or guaranteed".[35]

Where an insured becomes insolvent, the 2019 Act provides that any money payable to the insured under an insurance policy must only be used for the purpose of "discharging in full all valid claims by the third party against the [insured] in respect of which those moneys are payable, and no part of those moneys shall be assets of the person or applicable to the payment of the debts (other than those claims) of the person in the insolvency or in the administration of the estate of the person, and no such claim shall be provable in the insolvency or in the administration of the estate of the person".[36]

Comparison with the system in England and Wales

The position in England and Wales was originally governed by the Third Parties (Rights Against Insurers) Act 1930 (the 1930 Act), which was quite similar to s.62 of the CLA of this jurisdiction. However, unlike s.62 of the CLA, there was no necessity in the 1930 Act to establish an insured's liability before the transfer of the insured's rights to the third party took place.[37]

This regime was subsequently replaced by the 2010 Act. Under s.2 of the 2010 Act, a third party has the right to join an insurer directly to proceedings without first having to establish liability.[38] The Act allows a third party to seek declaratory relief in terms of both the liability and/or potential liability of the insured to the third party.[39] The court may make an order in granting judgment against an insurer.[40] In addition, any declaratory order that a court makes "binds the insured as well as the insurer".[41]

Further, the following provisions of the 2010 Act are nearly identical to the key provisions of the 2019 Act discussed above: (i) an insurer may rely upon a defence that would be available to the insured in normal circumstances;[42] (ii) Schedule 1 of the 2010 Act allows for a third party to request relevant information relating to an insured's policy; (iii) a third party who has acquired rights under the 2010 Act may now fulfil a condition precedent that the insured would have been required to fulfil in order for there to be coverage in the matter;[43] and, (iv) no condition shall be attached requiring the insured person to provide information to the insurer if it is not possible to fulfil said condition because the insurer had died or has been wound up.[44]

The courts in England and Wales have held that s.2 of the 2010 Act permits an applicant to bring proceedings against the insurer and the applicant may add the insurer as a co-defendant "so as to establish by way of declaration the liability of [the insured] to the claimant and secondly, the insurer's … potential liability to the claimant".[45]

Furthermore, the courts have held that if an insurer is added as a co-defendant they are "entitled to make such submissions and call such evidence as it wishes to make in response to the claims by the claimant".[46]

In addition, it is the insurer's decision whether or not they choose to take

an active role in proceedings under s.2 and the insurer may "take no part in the proceedings on the basis that it is satisfied that it has a good defence that there is no coverage".[47] An insurer may seek declarations and/or have preliminary issues determined in respect of the issue of coverage.[48] In the interests of reducing legal costs, an insurer may decide whether it wishes to have the issue of coverage determined before the main trial.[49]

Practical implications of the 2019 Act for Irish practitioners

The position in Ireland under the 2019 Act for third parties is now broadly in line with the position in England and Wales. This brings clarity for practitioners representing both plaintiffs and insurers in Ireland. As a result of the 2019 Act, a plaintiff may pursue insurers directly, rather than having to engage in multiple sets of proceedings and without first having to establish the liability of the insured.

Further, a third party may now fulfil any obligations that exist under a policy that are a condition precedent to a policy. A third party can now step into the shoes of an insured and decide to pay the excess due to the insurer under a policy. Such third party can proceed with the claim and recover damages from the insurer where such damages are rightfully due and owing. In addition, an insurer cannot rely upon the fact that an insured did not notify the insurer of the claim in order to refuse to indemnify an insured and leave the third party in a situation whereby they are unable to recover damages.

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2. See: SI 329 of 2020 – Consumer Insurance Contracts Act 2019 (Commencement) Order 2020.
3. The author notes that Article 18 of Directive 2009/103/EC 22 (hereinafter the Sixth Motor Insurance Directive) also allows for a right to sue an insurer directly where a party suffers injury as a result of a road traffic accident. See also s.76 of the RTA Act 1961.
4. If a claim is taken against a company that is in liquidation, then leave would have to be sought from the High Court as per s.1347 of the Companies Act 2014.
5. Buckley, A.J. *Buckley on Insurance Law (4th ed.)*. Round Hall, Dublin: p. 483.
6. [2013] IEHC 50.
7. Para 22.
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10. *Campbell v O'Donnell* [2009] 1 I.R. 133.
11. [2012] IEHC 530.
12. Para 41.
13. Jennings, C., Scannell, B., Sheehan, D.F. *The Law of Personal Injuries (2nd ed.)*. Round Hall, Dublin: para 14-16.
14. [2020] IEHC 658.
15. *Ibid* at 163.
16. s.21(4).
17. s.21(5).
18. s.21(1).
19. It is unclear whether this Act applies to any third party or just those who fit the definition of a consumer, which is defined under the 2019 Act as per the same definition in s.2(1) of the Financial Services and Pensions Ombudsman Act 2017. However, at para 6.18 of The Law Reform Commission's Report on Consumer Insurance Contracts (LRC 113 – 2015), it states that a third party is defined as a consumer in line with the above definition.
20. 2019 Act – s.21(2).
21. s.21(3).
22. s.21(6).
23. s.21(6)(c).
24. s.21(6)(d).
25. This is defined under s.21(10).
26. s.21(7).
27. s.21(8).
28. The normal jurisdiction monetary thresholds apply. See s.22(8) and s.22(9).
29. s.22(2).
30. s.22(4).
31. s.22(5).
32. s.22(6).
33. s.22(7).
34. s.21(9).
35. s.21(13).
36. s.21(11).
37. *First National Tricity Finance Ltd v OT Computers Ltd* [2004] EWCA Civ 653.
38. s.1(3) of the Third Parties (Rights against the Insurers) Act 2010.
39. s.2(3).
40. s.2(6).
41. s.2(10).
42. s.2(4).
43. s.9(2).
44. s.9(3).
45. *BAE Systems v RSA* [2017] EWHC 2082 (TCC) at 10.
46. *Ibid* at 20.
47. *Ibid* at 21.
48. *Ibid* at 22.
49. *Ibid* para 23.

What the law ought to be

Retired UK Supreme Court judge Lord Sumption speaks about his views on government responses to the Covid-19 pandemic and where we should draw the boundaries between law and politics.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

A desire to provide a comfortable standard of living for his family led Lord Sumption away from a career as a historian and towards one in law. He has retained his strong interest in history, however, publishing four volumes of a highly regarded history of the Hundred Years' War, with a final volume still to come. For him, a sense of our place in history adds enormously to human experience: "There's an old cliché that lawyers and judges are out of touch with real life. But the truth is that we're all of us out of touch with real life. Real life is too vast and too varied for any one person to understand more than a small part of it, and we are all dependent on what we know indirectly for most of our experience. History is a terrific source of that kind of experience. It teaches you to put things in proportion that might seem immensely wonderful or completely disastrous at the time, but in the longer perspective, often turn out to be pretty routine".

Lord Sumption's career has been anything but routine. As an advocate, he was involved in a number of high-profile cases, appearing for the UK Government in the Hutton Inquiry into the death of the former UN weapons inspector Dr David Kelly, and defending Russian billionaire Roman Abramovich in a private lawsuit brought by fellow Russian oligarch Boris Berezovsky. He doesn't dwell on past victories or defeats, however: "I think that particularly as an advocate, you have to disengage to a large degree from your cases. If one is too enthusiastic about winning them or too depressed about the prospect of losing them, one tends to lose objectivity. I can genuinely say that there are no cases which I'm particularly proud of winning simply because I won them, or ashamed of losing simply because I lost them. I will just say this, that there is somehow a special pleasure, when you believe that your client is right, in winning a case which the world at large thought that you ought to lose. The Hutton Inquiry was a case in which public opinion and the press was deeply hostile to the Government. I thought that the press were being extraordinarily one-sided about this and it was a source of some satisfaction to see them confounded by the results".

Covid and controversy

In more recent times, Lord Sumption has found himself at the centre of public debate, and indeed controversy, about UK Government policy in response to Covid-19. He is strongly opposed to the policy of lockdowns in particular, describing it as a "pouncing totalitarianism": "I think you have to start by asking yourself: what is the characteristic feature of a totalitarian state? A totalitarian state is one that treats human beings as mere instruments of collective policy. That is exactly what has happened in the United Kingdom and in Ireland in relation to Covid-19. Human beings have been deprived of

Law and culture

Jonathan Sumption, Lord Sumption, studied history at Magdalen College, Oxford, and taught medieval history there before pursuing a career at the Bar. He was called to the Bar in 1975, and elected Queen's Counsel in 1986. He was appointed an Officer of the Order of the British Empire (OBE) in the 2003 New Year Honours.

In 2011, he became the first lawyer appointed to the UK Supreme Court without previously serving as a full-time judge. He retired from the Court in 2018. After his retirement, Lord Sumption was appointed as a Non-Permanent Judge of the Court of Final Appeal in Hong Kong. His published work includes a major history of the Hundred Years' War, of which four volumes have been published so far, as well as ***Trials of the State: Law and the Decline of Politics*** (2019), and ***Law in a Time of Crisis*** (2021). He is a director of the English National Opera and a governor of the Royal Academy of Music.

the right to make their own risk assessments, have been confined to their homes, have been treated, in other words, as mere instruments of policy. To my mind, that is a grossly immoral thing to do, even if it saves lives".

His view is that the pandemic, especially when seen in a historical context, does not merit such a response: "I do not regard liberty as an absolute value, but I do think that it is a very high value. I agree that the disease is serious, but it's within the range of what, looking at matters historically, we have to live with. I would take a different view if we were talking about a mass outbreak of Ebola, with a case mortality rate of 50%. But we are dealing here with an epidemic disease, which primarily strikes people in the final decades of their life, and which has a mortality rate between 0.15% and 0.9%. It seems to me that to put one's head in a bag and close down the whole of one's social life, one's schools, one's economy, is an extraordinary thing to do for an epidemic of that kind".

It is dangerous, in his view, to look at these events in isolation, or to trust that such measures will not form part of a greater threat: "Governments have immense powers, some of which, for extreme occasions, they need. The most important factor is the collective sentiment which determines how far governments can go in using them. Until last March, it was absolutely unthinkable in any Western democracy that governments should lock into their homes the entirety of the population, including perfectly healthy people. That is no longer unthinkable. What Covid has taught us is something that political theorists have understood and spoken about for at least three or four hundred years, namely that fear will induce people to surrender their liberties to an absolute state".

He points out that this is not purely, or even predominantly, an issue of law, but one of collective morality and shared values: "When I make these points, I think probably I'm not speaking so much as the lawyer, but as a social scientist and moralist. Social science and moral judgement are the basis of law, but they are much larger than law. And to me, the prime accusation to be made against governments that have locked their populations down is that they have attacked some of the most basic instincts of humanity. Interaction between human beings is not a luxury, it's not an optional extra. It is one of the most basic necessities that we experience as social animals. And that is why it seems to me that the lockdown is immoral. It's immoral because it is an attack on our humanity".

Justifications

One of the principal justifications for lockdown has been, of course, that while younger people are at a far lower risk of death from Covid-19, increased hospitalisations and ICU admissions lead to public health systems becoming overwhelmed, which has a catastrophic impact on the ability of those services to provide other vital healthcare. Lord Sumption has an interesting perspective on this, feeling that government neglect of public health services should not be used as an excuse for lockdowns: "In Britain we have a health service whose intensive care capacity has been run down for at least two decades. I do not accept that because the Government messes up the National Health Service, it has the right to lock us down so that we will not need the National Health Service. It seems to me that public health services exist to promote life and that it's a distortion of that purpose to use them as an argument for preventing people from living life as they are entitled to live it".

> *The job of the courts is to apply the law and not to say what the law ought to be. The job of politicians is to say what the law ought to be and to do something about it, if it ought to be different.*

Lord Sumption's views, in particular as expressed in a television appearance with Deborah James, a stage IV cancer sufferer, have attracted a great deal of media attention and comment. He says, however, that despite attacks on social media and elsewhere, not all of the comments have been negative: "I get a great deal of support as well as a fair amount of obloquy. But the obloquy generally consists of abuse rather than reasons.

"I get a very large virtual mailbag from people who believe that I am speaking for them, that I have voiced issues that other people are keen to sweep under the carpet, and I get a fair amount of mail from people in the health service, in the civil service and in parliament who say, paraphrasing, that they don't dare to make these points, but they are glad that I'm making them."

He is certainly not in any way troubled by the response to his comments: "I've had plenty of brickbats thrown at me in my life, and I'm not worried about taking a few more.

"I'm in a very privileged position because I'm retired, I'm not beholden to anybody. It really doesn't matter to me what people think about me. It matters to me what they think about my views, but what they think about me, it's water off a duck's back."

Life after the courts

Lord Sumption says he does not miss court life: "I enjoyed doing it, but I think it's silly to look backwards, and there are plenty of other things in life than sitting in court or standing in court. And I'm doing some of those now".

While some of those things have certainly been curtailed by the current restrictions, such as enjoying live musical performance, he says there are other things he can do: "You can't have live music in lockdown unless you make it yourself, but you can have recorded music. And if you're lucky enough to have a garden, you can dig it. That's what I like doing".

He also intends to finish the final volume of his history of the Hundred Years' War: "After that, I don't know what I shall do, but I'll do something".

The pendulum swings

These thorny issues of law, politics and society have occupied Lord Sumption since long before the arrival of Covid-19. In previous writing and lectures, he has spoken at length about the relationship between law and politics, and how he feels that in recent years, particularly since the advent of the European Convention on Human Rights, the lines have become blurred, with the law often taking on roles and decisions better left to politicians, who are ultimately answerable to an electorate: "The job of the courts is to apply the law and not to say what the law ought to be. The job of politicians is to say what the law ought to be and to do something about it, if it ought to be different. That is an excessively simplistic view of a difference which is much more complex, and a boundary which is quite hard to draw. The courts are entitled to say that the Government is acting beyond its powers. What they are not, it seems to me, entitled to, is to say that they disapprove of the underlying policy of the decision that they are considering. In many respects, our law has invited them to do this. In particular the Human Rights Convention has that effect because it requires courts rather than politicians to weigh up incommensurate values. How do you weigh up, for example, the demands of liberty against the demands of national security? These are two entirely incommensurate values, and deciding which of them should have priority is a fundamentally political question. It seems to me that we are entitled to have a body of people who make these decisions and who make them knowing that they are liable to be punished at the polls or sacked if they make them wrongly. Judges cannot be punished by polls and cannot be sacked, and quite right too. That is why they should not be deciding issues of that kind".

He feels that judges in Britain have in recent years been keen to advance their own role in deciding these issues, and thus to politicise the judiciary, but returns to the idea of historical context when he speaks of a "pendulum" aspect to such developments, with signs that the current generation of judges is moving away from this viewpoint, a development that he welcomes: "I also think it's probably the only way of dealing with the problem, because there isn't a single proposition of law which you can amend or repeal, and thereby put an end to this problem. You cannot have an act of parliament that says judges must be more careful about the interaction between politics and law. It's a matter of fundamental judicial attitudes. But there have been a number of decisions which I think have demonstrated that British judges at any rate are becoming more conscious of this problem".

The personalisation of the courts, he says, is another dimension of the same problem, and he refers specifically to the US Supreme Court as a fascinating example of this: "There have been a number of decisions on very sensitive, but ultimately political questions, like positive discrimination, same sex marriage, abortion, which would probably have gone differently in a Supreme Court constituted as it is today. I find it very difficult to accept as law something which is so profoundly sensitive to the personalities of the individuals who sit on the court".

As a retired judge, however, Lord Sumption is free to express his views: "I'm a citizen. It's true that having been a senior judge has given me a platform. It means that people will listen to me who might not otherwise do so. But nobody is under the impression that I'm speaking about law or that I'm speaking judicially".

Personal injuries

At a time of significant change to the system around personal injuries in Ireland, it is interesting to consider Lord Sumption's comments on the subject, which were made originally in a lecture to the UK's Personal Injury Bar Association, and reproduced in his most recent book. In the lecture, Lord Sumption makes a case for the abolition of fault-based liability in favour of a state-funded insurance system against personal injury, such as exists in New Zealand. While he accepts that this policy has proven to be extremely expensive, he points out a number of problems with the current, fault-based system: "Litigation is expensive and wasteful, and the system, which is based on litigation, needs to be looked at. Secondly, I think you have to look at the extent to which personal injuries damages are socialised anyway. Personal injuries at work are covered by compulsory insurance legislation. The employer has to be insured. The cost of this is ultimately paid by employers through their premiums and indirectly by the public through the prices that they pay for goods and services. Motor accidents are also subject to compulsory insurance, and the same applies. So the cost of personal injury compensation actually falls on the generality of the public anyway through premiums and prices. In that case, we might as well pay for it centrally. There is a third and final factor that leads on from that, which is that there is some, to my mind, moral question about whether the entitlement to compensation for a personal injury should be limited to those who have the good fortune to have been injured by somebody who was negligent. There are plenty of injuries which are caused without negligence, and we tend to push out the boundaries of negligence in order to find the pocket from which the payment of compensation can be made, and that both distorts the law and makes it, I think, less morally justifiable".

LEGAL UPDATE

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The Law Library

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A directory of legislation, articles and acquisitions received in the Law Library from January 15, 2021, to March 11, 2021.
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Private versus professional life – what are the boundaries?

Recent case law in other jurisdictions sheds light on how the Irish courts may view cases where the boundary between professional conduct and private life is called into question.

Maurice Osborne BL

While watching the recently released series *Tiger*,[1] which documents Tiger Woods' fall from grace after the revelation of his multiple infidelities, a clip was shown of the then Chairman of Augusta National Golf Club, Billy Payne, stating: "It is not simply the degree of his conduct that is so egregious here. It is the fact that he disappointed all of us…" There is an obvious difficulty in the merging of Woods' life as a professional golfer and his life off the golf course. In a legal context, the recent UK High Court decision of *Beckwith v Solicitors Regulation Authority*[2] has highlighted the importance of regulatory bodies marking a definitive line between conduct relevant to a professional's working life versus conduct relevant to their personal life. In particular, this case considered the meaning of legal professionals acting with "integrity", along with the meaning of "behaviour" that is capable of undermining public trust in a profession. With the ever-increasing overlap in our working and private lives, and the inevitability of this issue coming before the Irish courts, practitioners in this jurisdiction should take note of this decision. This article discusses the implications of *Beckwith*, and the interpretation of Article 8 of the European Convention on Human Rights (ECHR) in this context.[3]

Beckwith v SRA

Beckwith v SRA concerned an appeal of a decision of the Solicitors Disciplinary Tribunal. Ryan Beckwith, a partner in Freshfields Bruckhaus Deringer Solicitors, was subject to a disciplinary hearing arising out of a sexual encounter he had with a female colleague while socialising on a work night out. The Tribunal's finding was that both the appellant and his female colleague, who was referred to as Person A during the hearing, were heavily intoxicated.[4] The Tribunal made no finding in relation to whether the sexual encounter was consensual. The Tribunal considered that it would be improper to make a ruling on the issue of consent as there was no allegation put forward by the Solicitors Regulation Authority (SRA) in relation to that issue.

The Tribunal found that he was guilty of misconduct, and had breached the Solicitor Regulation Authority Handbook.[5] The Tribunal concluded that Mr Beckwith had not abused his position of seniority or authority during the encounter with his colleague; however, it found that his behaviour was inappropriate and as such breached two of the principles of the Handbook:[6] first, Principle Number 2, which requires a solicitor to "act with integrity"; and, second, Principle Number 6, requiring a solicitor to "behave in a way that maintains the trust the public places in you and in the provision of legal services". Mr Beckwith was found to have breached Principle Number 6 because members of the public would not expect a solicitor to conduct himself in such a way, and his conduct "affected not only his personal reputation but the reputation of the profession".[7]

The Tribunal fined Mr Beckwith £35,000 and ordered that he pay 60% of the SRA's legal costs, amounting to £200,000.

Appeal to the High Court

Mr Beckwith appealed the Tribunal's finding that his conduct amounted to a breach of the two principles and appealed the Tribunal's costs order. There was no dispute as to the Tribunal's findings of fact.

(i) Acting with "integrity"

The High Court concluded that the Tribunal had wrongly applied Principle 2, requiring solicitors to act with integrity, to the facts regarding the alleged abuse of his position of seniority. In coming to this conclusion, the Court considered the case of *Solicitors Regulation Authority v Wingate*[8] and its interpretation of three principles of integrity. The first was that:

"[T]here is an association between the notion of having integrity and adherence to the ethical standards of the profession. This is consistent with the ordinary meaning of the word, namely adherence to moral and ethical principles".[9]

The second principle of integrity was:

"[O]n matters touching on their professional standing there is an expectation that professionals may be held to a higher standard than those that would apply to those outside the profession".[10]

Finally, the third principle was as follows:

"[A] regulatory obligation to act with integrity 'does not require professional people to be paragons of virtue'".[11]

These comments of the Court would appear to suggest that while there can be an overlap in the manner in which professionals ought to conduct themselves both in their professional and personal lives, a division of some sort is necessary where the conduct in question is not relevant to their working life.

(ii) Behaving in a manner that maintains public trust

The SRA submitted that the public would have a "legitimate concern and expectation that junior members [of the profession or of staff] should be treated with respect"[12] by other members of the profession. It is worth noting the obvious difficulty with this submission, namely that the Tribunal had concluded that Mr Beckwith had not abused his position of seniority or authority by mistreating his junior colleague. The Court emphasised that such a broad principle must be "informed by careful and realistic consideration" of the standards in the Code of Conduct. It warned that otherwise, the application of such a principle could become "unruly".[13] The Court stated as follows:

"There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitors' profession and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned, disgraceful".[14]

The Court acknowledged that Mr Beckwith's behaviour had affected his own reputation but again emphasised the "qualitative distinction" that was required to be made between conduct of that order and conduct that affects his own reputation as a provider of legal services or the reputation of his profession.

The findings of the High Court in relation to the alleged breaches of the principles raise significant issues in this area, not least of which is the importance of regulatory bodies accurately identifying how a registrant may have breached the regulatory code, but further, to carefully distinguish what may be damaging to the reputation of an individual in a personal context and in a professional context.

The Court acknowledged that a Tribunal must be "realistic"[15] in its approach when interpreting the principles of both acting with integrity and behaviour capable of undermining public trust, and they certainly do not require perfection or for professionals to be "paragons of virtue".[16] There is a clear distinction, as confirmed by the Court, between behaviour that is wrong, and behaviour that undermines a profession. It is useful to remind ourselves of the interpretation of Article 8 of the EHCR (the right to privacy) by the European Court of Human Rights (the ECtHR) as regards professional and business relationships. In *Campagnano v Italy*,[17] the ECtHR highlighted the importance of Article 8 in that it must allow individuals to develop such relationships:

"[P]rivate life 'encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature' (see *C. v Belgium*, 7 August 1996, § 25, Reports 1996- III). It also considers that Article 8 of the Convention 'protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world' (see *Pretty v the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and that the notion of 'private life' does not exclude in principle activities of a professional or business nature".

With this judgment in mind, and in particular the practical approach taken by the High Court in line with the ECtHR's comments above, the judgment of the Court is unsurprising and will be welcomed by professionals in both the UK and in this jurisdiction. However, it raises interesting arguments regarding Article 8 of the ECHR and the duty of professionals to ensure that behaviour in their private lives does not affect their professional life.

The Tribunal fined Mr Beckwith £35,000 and ordered that he pay 60% of the SRA's legal costs.

Duty to uphold standards "at all times" versus Art. 8 ECHR

The decision of *Beckwith* raises further considerations regarding the application of Article 8 of the ECHR, which provides for the right to respect for private and family life. Mr Beckwith argued that the regulatory rules in the Handbook lacked legal certainty, as they applied to conduct outside of the workplace and that, even if the rules met the test of legal certainty, such an invasion into one's private life could not be justified on public interest grounds.[18] The Court dismissed both arguments, concluding that the regulatory rules met the test of legal certainty because the principles were determined with reference to the Code of Conduct. The Court stated that there can be:

"no hard and fast rule either that regulation under the Handbook may never be directed to the regulated person's private life, or that any/every aspect of her private life is liable to scrutiny".[19]

For the above reasons, the Court found no breach of Mr Beckwith's rights to Article 8 of the ECHR. In this context, the wording of the regulatory codes in this jurisdiction provides some guidance on the extent to which regulatory

bodies may attempt to enforce professional standards both in and out of the workplace. For example, the Code of Conduct of the Pharmaceutical Society of Ireland states that registrants must ensure that "conduct at all times, both inside and outside of [the] work environment" maintains public trust and confidence in the pharmacy profession.[20] As we are all aware, there are similar provisions in the Code of Conduct for The Bar of Ireland. For example, Rule 2.2 of our Code of Conduct obliges members to uphold the standards set out in the Code "at all times" and "failure to do so may constitute professional misconduct … rendering a barrister liable to disciplinary proceedings".[21]

Regulatory bodies, such as the Medical Council, the Nursing and Midwifery Board of Ireland and the Dental Council, have gone further and responded to the rapid increase in the use of social media to warn practitioners regarding their communication on social media. The guidance from the Medical Council in this respect provides that the use of social media by registrants "should still maintain the professional standards expected in other forms of communication".[22] The Nursing and Midwifery Board of Ireland[23] and the Dental Council[24] have also provided guidelines regarding the use of social media. The incorporation of these guidelines will inevitably be subject to debate in upcoming regulatory proceedings.

The use of social media was the subject of a decision in *BC v Chief Constable Police Service of Scotland and others*,[25] where it was held that the right to privacy under Article 8 of the ECHR was not breached when a police officer's employer used WhatsApp messages on his smartphone to investigate allegations of offences of a sexual nature in the workplace. The Court held that the conduct of police officers is subject to certain standards, regardless of whether they are on duty or not.

For example, if a pharmacy professional engages in a racist tirade on Twitter, that may well shed light on how he or she might provide professional services to a person from an ethnic minority.

In a case before the ECtHR, albeit in an employment law context, the right to private life pursuant to Article 8 of the ECHR and the right to privacy pursuant to Article 7 of the Charter of the Fundamental Rights of the EU were examined. In *Barbulescu v Romania*[26] the Grand Chamber of the ECtHR confirmed that the right to a private life may include professional activities. This case concerned an employee who was dismissed for using a work email account, Yahoo Messenger, to communicate with family members. His Article 8 rights pursuant to the ECHR had been breached by his employer's inspection of his emails. The decision serves as a reminder to employers that there may be circumstances in which there is an overlap between one's work and personal life.

The recent case of *Garamukanwa v United Kingdom*[27] found that there was no breach of privacy pursuant to Article 8 of the ECHR when an employer relied on material found on the employee's phone during a disciplinary process. The employee, Mr Garamukanwa, was dismissed for gross misconduct arising out of inappropriate emails he sent to another employee with whom he had been in a relationship. The Court concluded that Mr Garamukanwa had no reasonable expectation that the content from his phone would remain private, as he was aware of complaints that his former partner had made about him to her employer. This meant that he could not rely on Article 8 of the ECHR. The Court emphasised, however, that employers must act with caution in their use of private information in disciplinary procedures. The fact that Mr Garamukanwa had been the subject of a complaint by another employee and that he was aware of this complaint was the deciding factor in this case. In another situation, where no complaint had been made, he could have had a reasonable expectation that the content from his phone would have remained private.

In *R (on the application of Pitt and another) v General Pharmaceutical Council*,[28] a new regulatory code was challenged by two registrants. It was submitted that the respondent was acting *ultra vires* by implementing a code that required registrants to comply with its standards "at all times, not only during working hours". Similar to the *Beckwith* case, it was argued that such a broad provision lacked legal certainty and amounted to a breach of Articles 8 and 10 of the ECHR.

In finding for the General Pharmaceutical Council, the Court concluded that it had broad discretionary powers that allowed it to implement the professional standards it deemed necessary. The Court emphasised that the extent to which professional standards infringe on the personal life of a registrant must be dependent on the facts of a particular case. The Court provided two very helpful examples of what behaviour outside of working hours would and would not be subject to disciplinary proceedings:

"If the claimants are not polite over a board game they will not need to lose sleep over whether they can make the relevant declaration that they have complied with the Standards. On the other hand, there may be occasions which occur outside normal working hours and perhaps in a context which is completely unrelated to the professional work of a pharmacist which may be relevant to the safe and effective care which will be provided to patients. For example, if a pharmacy professional engages in a racist tirade on Twitter, that may well shed light on how he or she might provide professional services to a person from an ethnic minority".[29]

This case seems to suggest that, even if a professional worker posts inappropriate comments on social media, such comments must have some connection to the professional service itself and not simply be capable of undermining the profession as a whole.

This position is arguably in contrast with the position in this jurisdiction. The definition of professional misconduct, as set out in the *O'Laoire v Medical Council*[30] decision, is relied upon in the prosecution of medical practitioners, nurses and dentists. Its definition captures conduct unconnected to the service provided but which is infamous, disgraceful or brings the profession into disrepute. An interesting UK authority in this respect is the decision of *Martens v Royal College of Veterinary Surgeons*

Disciplinary Committee.[31] The registrant in that case was found guilty of "disgraceful conduct in a professional respect" arising out of his failure to care for his own farm animals. On appeal, the decision of the Committee was upheld. While he had neglected his animals in a personal capacity, the fact that he was a registered vet meant that his behaviour had brought the profession into disrepute.

The UK decision of *Nwabueze v General Medical Council*[32] concerned a doctor who had engaged in consensual sexual conduct in his surgery rooms. The conduct was not with a patient of his and, as such, the Court concluded that it did not amount to misconduct.

This is in contrast to the recent decision of *T. v The Nursing and Midwifery Board of Ireland*, where a psychiatric nurse had an ongoing relationship with a patient in his care. The relationship between two individuals in a particular profession is often highly relevant. In the medical sphere, more often than not, a relationship between registrant and patient will amount to misconduct. This is in contrast to the *Beckwith* decision concerning colleagues in an office.

While he had neglected his animals in a personal capacity, the fact that he was a registered vet meant that his behaviour had brought the profession into disrepute.

In *Royal College of Veterinary Surgeons v Samuel*,[33] the registrant had been found guilty of a number of criminal offences, namely, theft, common assault and using threatening/abusive words. Although the fitness to practise inquiry concluded that these offences were in no way connected to his professional practice, his name was removed from the register. This was on the basis that it would damage the reputation of the profession.

On appeal, the decision of the Fitness to Practise Committee was quashed. The Court held that the criminal convictions were not related to Dr Samuel's work and, as such, could not be regarded as potentially damaging to the reputation of the profession.

The Court found that there were a number of mitigating factors in the criminal proceedings, including the fact that Dr Samuel had been subject to racial abuse during the incident that led to the convictions.

The Court therefore concluded that members of the public would not think less favourably of the profession.

While there are limited authorities in this jurisdiction dealing with this issue, the courts have emphasised the effect fitness to practise inquiries have on the personal life of registrants. In *Corbally v Medical Council and ors*,[34] the Supreme Court noted that tribunals and committees need to approach matters touching on a registrant's private life in a realistic manner having regard to the consequences.

Conclusion

While the *Beckwith* decision may be interpreted as a decision that pushes back on regulators' potential invasion of registrants' professional lives, there is no hard and fast rule that can be applied to this area of the law. As noted by the UK High Court in *Ngole v University of Sheffield (Health and Care Professions Council Intervening)*:

"Professional discipline, rightly, sits relatively lightly on its members outside the workplace, but it is never entirely absent where conduct in public is concerned".[35]

As seen from the above case law, regulatory bodies must be cautious not to infringe on a registrant's personal life in breach of Article 8 of the ECHR. In an employment law context, the *Garamukanwa* decision highlights how employers must be prudent in determining when to rely on possibly private information in disciplinary proceedings. It is anticipated that the influence of social media will lead to this issue being addressed more often before the courts.

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23. Code of Professional Conduct and Ethics of the Nursing and Midwifery Board of Ireland at page 7.
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28. [2017] EWHC 809 (admin).
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33. [2014] UKPC 13.
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The limits of post-Brexit judicial co-operation

In the absence of new post-Brexit legal instruments, cross-border civil and commercial litigation between EU member states and the UK is likely to be less predictable, more time consuming and more costly.

Hannah Godfrey BL

Since January 1, 2021, European Union (EU) law has no longer applied to the United Kingdom (UK). The legal instruments that affect cross-border civil and commercial matters that have ceased to have effect include, *inter alia*: Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast); Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I); and, Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II). Equally, the Lugano Convention 2007, to which the UK was party only through its membership of the EU, has ceased to apply to the UK and the UK's application to accede to Lugano has not yet been approved by the EU.

The Trade and Cooperation Agreement (TCA) agreed in principle between the EU and the UK, which came into effect provisionally on January 1, 2021, contains no provisions providing for a framework of judicial co-operation in civil and commercial matters. Litigation between parties in EU member states and the UK going forward largely falls to be determined by the laws on private international law that apply in each jurisdiction, except in limited situations where the Hague Choice of Courts Convention 2005 applies. The loss of the legal instruments determining jurisdiction and providing for enforcement of judgments will inevitably make cross-border litigation between EU member states and the UK less predictable, more time consuming and more costly.

Background

On January 31, 2020, the UK left the EU. On January 24, 2020, the two parties had signed the Withdrawal Agreement, which provided for a transition period during which EU law would continue to apply in the UK. On December 31, 2020, at 11.00pm GMT, the transition period came to an end. Despite fears that no agreement on a future relationship would be reached before this point, on December 24, 2020, the UK and the EU agreed in principle on the terms of the TCA, which came into effect provisionally on January 1, 2021.[1]

The Withdrawal Agreement (which remains in force, albeit that some of its provisions as to the transition period now have no application) contains specific provision for the continuance of judicial co-operation procedures between the UK and EU member states during the transition period, including in respect of proceedings commenced but not concluded before the end of the transition period. In contrast, there are no provisions for permanent co-operation in this sphere in the TCA.

Jurisdiction/choice-of-court clauses

Brussels I Recast

In brief, Brussels I Recast sets out the rules that apply between member states as to which state has jurisdiction over a dispute. The overarching principle of Brussels I Recast is that a defendant should be sued in the place of domicile, but there are a number of special jurisdictional provisions, including the provision in Article 7(1)(a) that in matters relating to a contract, the courts that are competent to hear the dispute are those of "the place of performance of the obligation in question". Article 25 provides that:

"If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise".

In some cases involving the UK courts, Brussels I Recast will still apply. Article 67(1) of the Withdrawal Agreement provides that the provisions of Brussels I Recast still apply in respect of "legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings".

There is no definitive interpretation available as to whether or not proceedings need to be served rather than simply issued in order to have been "instituted", but the Bar Council of England and Wales notes that interpreting being instituted as meaning the "issuance'' of proceedings would be consistent with the rules in Article 32 of Brussels I Recast as to when a court is seised.[2]

The Commission's Notice to Stakeholders of August 27, 2020, makes clear that the reference to "related proceedings" is to "proceedings involving the same cause of action and between the same parties are brought in the courts of a Member State and the United Kingdom (*lis pendens*) before and after the end of the transition period respectively (or vice-versa)". In other words, where there are parallel proceedings in being in the UK and an EU member state, so long as at least one of the actions was instituted before the end of the transition period, Brussels I Recast still applies.

Articles 33 and 34 of Brussels I Recast continue to apply to EU member states (but not to the UK) and set out limited circumstances in which a court should stay its proceedings even where it has jurisdiction under the Brussels regime.

It would appear that the Commission views access to the Brussels/Lugano regime as a benefit of the single market that cannot be cherry-picked.

The Lugano Convention 2007

In the vast majority of cases where the jurisdiction of the UK courts is in issue, Brussels I Recast will not apply. The UK's stated preference is to accede to the Lugano Convention 2007, which is based on Regulation (EC) No. 44/2001, i.e., the original Brussels I Regulation. The current contracting parties are the EU,[3] Iceland, Norway and Switzerland. On April 8, 2020, the UK applied to join. Article 72(3) of the Lugano Convention provides that the unanimous agreement of the contracting parties is required for a new state to accede, unless that state is a member of European Free Trade Association (EFTA) or an EU member state is acting on behalf of its non-European territories. It further provides that the contracting parties "shall endeavour to give their consent at the latest within one year". Iceland, Norway and Switzerland have already stated that they support the UK's application,[4] but the EU has, at the date of writing, not yet consented. The Lugano Convention falls within EU rather than member state competence, as was made clear in Opinion 1/03.[5] It would appear that the Commission views access to the Brussels/Lugano regime as a benefit of the single market that cannot be cherry-picked. All the current signatories to Lugano are in the single market, whether due to their status as EU member states, via the Agreement on the European Economic Area with the EFTA states other than Switzerland or, in the case of Switzerland, via bilateral agreements. It remains to be seen whether the UK will be permitted to join (and it should be noted that even once approved, there will be a waiting period of up to three months).[6]

Lugano merits some consideration as, if the UK is allowed to accede, this will be the instrument governing judicial co-operation on jurisdiction and enforcement between the UK jurisdictions and Ireland. It mirrors the defects of the original Brussels I Regulation. Notably, Lugano does not address the problem of the "Italian torpedo" by which litigants can commence proceedings in a jurisdiction other than that named in a choice-of-court clause, usually one where litigation moves slowly, in order to frustrate the proceedings in the chosen jurisdiction. Under Lugano, even where there is an exclusive jurisdiction clause, the court first seised decides if it has jurisdiction and can determine that the chosen court has to decline jurisdiction. Brussels I Recast remedied this problem by providing that a chosen court has priority even where it is not the first court seised. Lugano also lacks any provisions equivalent to Articles 33 and 34 of Brussels I Recast, which provide for quasi-*forum non conveniens* decisions.

Hague Choice of Court Convention 2005

If the UK does not accede to Lugano (and certainly in the interim), the only international convention on jurisdiction that is of application to the UK is the Hague Choice of Court Convention 2005. The scope of the Hague Convention is somewhat narrow as it only applies where there is an exclusive jurisdiction clause (and it appears that this does not encompass

so-called asymmetric jurisdiction clauses).[7] Many areas of law are also excluded from its scope, including consumer and employment contracts, intellectual property and competition claims, among others. Furthermore, Hague only applies to agreements entered into after it has entered into force in the relevant state (Article 16(1)). Where the Hague Convention does apply, it is effective and generally prevents parallel proceedings in courts other than the chosen court.

There is disagreement as to the date from which the Hague Convention has been in force in the UK. The EU acceded on October 1, 2015. The UK acceded to Hague in its own right on January 1, 2021. The UK's position is that Hague has been in force continuously and has provided in primary legislation that: "the date on which the 2005 Hague Convention entered into force for the United Kingdom is October 1, 2015, and accordingly references in the Convention to a Contracting State are to be read as including, without interruption from that date, the United Kingdom".[8] In contrast, in its Notice to Stakeholders, the Commission has stated that: "The Convention will apply between the EU and the United Kingdom to exclusive choice of court agreements concluded after the Convention enters into force in the United Kingdom as party in its own right to the Convention". The Hague Conference appears to support the UK's position.[9] This is evidently of importance as it will affect whether choice-of-court clauses in favour of UK courts entered into between October 1, 2015, and December 31, 2020, bring disputes within the scope of the Hague Convention or not.

It is also noteworthy that if what is in issue is a choice-of-court clause nominating the English courts but the parties to the dispute are all domiciled in EU member states, Article 26(6) of Hague provides that in such a situation the Hague Convention shall not affect the application of an instrument such as Brussels I Recast ("the rules of a Regional Economic Integration Organisation that is a Party to this Convention"). So notwithstanding an exclusive jurisdiction clause in favour of the English courts, in such a situation, an Irish court would determine jurisdiction under the rules in Brussels I Recast. Given that the English courts have often been the chosen jurisdiction for international commercial agreements in the past, even where there are no UK-domiciled parties involved, this scenario is not an unlikely one.

Where the Hague Convention does not apply, then national laws concerning private international law will govern situations where it is contended in a member state court that the UK courts have jurisdiction. In Ireland, this means that the common law principles on private international law will apply.

Choice-of-law clauses

The ending of the transition period should have no effect on the approach taken in the EU member states or in the UK as to choice-of-law clauses. In the first place, Article 66 of the Withdrawal Agreement provides that Rome I continues to apply to the UK "in respect of contracts concluded before the end of the transition period" and that Rome II continues to apply "in respect of events giving rise to damage, where such events occurred before the end of the transition period". Further, the provisions of Rome I and Rome II will continue to bind the EU member states regardless, as the application of the two Regulations is not based on reciprocity. Finally, the UK has incorporated equivalent provisions into its national law, forming part of what is commonly now being referred to in the UK as "retained EU law".[10]

Where proceedings need to be served on a UK defendant, unless the procedures provided for in the Hague Service Convention are used, service will need to be effected in accordance with the law as it then stands in the relevant UK jurisdiction (i.e., England and Wales, Scotland or Northern Ireland) if the plaintiff is likely to be seeking to enforce the judgment in the same jurisdiction at a later stage.

Service

Two principal issues arise in relation to service. First, as the UK is now no longer able to avail of Brussels I Recast and is not (yet) party to the Lugano Convention, leave of the court is now required to issue and serve proceedings on a UK defendant. The usual test for leave to serve out of the jurisdiction will apply.

Once leave of the court has been obtained and the proceedings have been issued, the mechanics of serving documents abroad is also now more complex. The streamlined procedure under Regulation (EC) 1393/2007 (the Service Regulation) can no longer be used in respect of UK defendants, although Article 68(a) of the Withdrawal Agreement provides that it applies to documents that were received for the purposes of service before the end of the transition period by a receiving agency, a central body of the State where service is to be effected, or by competent persons (within the meaning of Article 15 of the Service Regulation).

The UK is a party to the Hague Service Convention 1965 in its own right. Service pursuant to the Hague Service Convention is provided for in Order 11E RSC. The main method of service facilitated by the Hague Service Convention is through the designated central authority in the state (which, in Ireland's case, is the Master of the High Court). Article 19 provides that other methods of service are compatible with the Convention providing that they are allowed under the receiving state's law. Notably, there are no time limits imposed under the Hague Service Convention, in contrast with Article 7(2) of the Service Regulation, which provides that a receiving agency shall serve a document as soon as possible and, in any event, within one month of receipt.

Where proceedings need to be served on a UK defendant, unless the procedures provided for in the Hague Service Convention are used, service

will need to be effected in accordance with the law as it then stands in the relevant UK jurisdiction (i.e., England and Wales, Scotland or Northern Ireland) if the plaintiff is likely to be seeking to enforce the judgment in the same jurisdiction at a later stage.

Finally, the UK has incorporated equivalent provisions into its national law, forming part of what is commonly now being referred to in the UK as "retained EU law".

Enforcement of judgments

The provisions of Brussels I Recast will continue to apply to the enforcement of judgments where the proceedings were instituted before the end of the transition period. The Commission Notice to Stakeholders of August 27, 2020, provides that this covers situations where: proceedings were in being before the end of the transition period but the judgment was only handed down afterwards; a judgment had been handed down but not yet enforced by the end of the transition period; and, a judgment had been exequatured but not yet enforced by the end of the transition period.

The advantages of being able to enforce a judgment under Brussels rules are readily apparent. Under Brussels I Recast, the exequatur procedure was abolished (although it still exists under Lugano rules), so there is no need for a judgment creditor to obtain a declaration of enforceability from the courts of the jurisdiction in which the judgment needs to be enforced. Under Brussels I Recast, it is also possible to enforce interim judgments such as freezing orders, which may be highly important if a litigant wishes to ensure that there will still be assets in the jurisdiction when there is a final judgment to enforce. It appears that the enforcement of interim judgments is also possible under Lugano.[11]

If the Hague Convention applied to the proceedings as to jurisdiction, then the judgment can also be enforced under the Hague provisions,[12] although this is not as straightforward a process as under the Brussels/Lugano regime. Hague also only allows for enforcement of final judgements and allows for enforcement to be refused in a number of different circumstances (see Article 9). The Hague Conference has produced a more comprehensive convention on judgments, the Hague Judgments Convention 2019, but currently the only signatories are Israel, Ukraine and Uruguay. The EU appears to be considering signing and the Commission launched a public consultation to obtain stakeholder views in 2020, but the UK's position is unclear. Regardless, it would likely be a matter of years rather than months even were both the EU and the UK to become signatories.

Absent the UK's accession to the Lugano Convention, the applicable law in most cases involving the UK will be the law of the jurisdiction in which the judgment is sought to be enforced. Where a UK judgment needs to be enforced in Ireland, common law principles will apply. Where an Irish judgment needs to be enforced in one of the UK jurisdictions, this will depend on the precise rules in place as to the enforcement of foreign judgments in England and Wales, Scotland and Northern Ireland.

Conclusion

Unless the UK is allowed to accede to Lugano, or some other judicial co-operation framework is established between the EU and the UK, cross-border litigants will, by comparison with recent years, face greater procedural complexity, delay and costs, and greater uncertainty as to whether a judgment can ultimately be enforced. It remains to be seen whether deteriorating political relations around the TCA in general will prevent any progress on these issues.

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1. The UK Parliament passed the European Union (Future Relationship) Act 2020 on December 30, 2020. On December 29, 2020, the Council adopted Decision (EU) No. 2020/2252 to the effect that the TCA would be signed and would come into effect provisionally subject to the consent of the European Parliament (which, at time of writing, has yet to be given, with the period for the TCA's provisional application now extended until April 30, 2021).
2. https://www.barcouncil.org.uk/uploads/assets/f044e7e9-c041-482e-892d1a216b01b6c7/7d8e40df-ae8a-4128-a66b2be43d09c124/Transition-FAQs-Part-III-Civil-Justice-Jurisdiction.pdf.
3. Denmark is a separate contracting party to the Lugano Convention as it fully opted out of Brussels I.
4. https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007.
5. Opinion of the Court 1/03 [2006] ECR I-1145.
6. On April 12, 2021, just as this article was going to press, there were reports in the media that the European Commission was likely to change its position and recommend that the EU should approve the UK's application to accede to Lugano. It remains to be seen whether or not the UK will in fact accede during 2021.
7. See Hartley, T., and Dogauchi, M. *Explanatory Report to the Hague Convention*, §32.
8. Private International Law (Implementation of Agreements) Act 2020, Schedule 5, s.7.
9. On its website (https://www.hcch.net/en/instruments/conventions/status-table/?cid=98), the Hague Conference lists the date of entry into force for the UK as October 1, 2015, notwithstanding that the date of ratification is given as September 28, 2020, when the UK deposited its instrument.
10. Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/834).
11. Pocar, F. *Explanatory Report on the Lugano Convention*, §130.
12. See Order 42D RSC.

Qui bono?

Now that the new Personal Injuries Guidelines have been adopted, The Bar of Ireland remains concerned that the voices of injured individuals have not been properly heard.

Maura McNally SC
Chair, Council of The Bar of Ireland

The adoption by the Judicial Council of Personal Injuries Guidelines has been received by the business lobby as "not going far enough". The insurance lobby has not firmly committed that the changes will impact on premia.

And those impacted by injuries through negligence have said…?

Perhaps I missed the submissions and reports of the ordinary men and women who have been seriously injured and disabled through the negligence of others; those persons who had been going through life, paying taxes, working, looking after loved ones, but who, through no fault of their own, have had their life expectancy shortened or quality of life seriously curtailed and their family lives undermined through the negligence of another. These are the silent thousands of citizens every year who have sought redress.

Plaintiffs have been cast in the role of villain, not victim, in an unrelenting campaign, in which the Government has played no small part (possibly because it is a defendant in so many cases).

This important group does not have a voice, mainly because those injured individuals are not an organised group and rely on the advocacy of the legal profession to represent their case, and in so doing, the legal profession is continuously accused of promoting its own self-serving agenda. For the avoidance of doubt, I make no apology for representing the best interest of my clients and for seeking a professional fee for carrying out my role in advocating for injured parties before the courts.

A question of data

One of the report's most striking elements is the acknowledgement that there is a paucity of actual data on court awards in Ireland. The report states that: "The Committee considers that there is little public appreciation of just how few claims for damages for personal injuries ultimately become the subject matter of an award of damages made by a court". In fact, 0.54% is the percentage of all claims concluded in the High Court. That is, 318 of 59,437 claims instituted between 2017 and 2019.

The independence of the judiciary and its decision to adopt the Guidelines are fully respected. It is very reassuring to note that the Personal Injuries Guidelines Committee has gone to great lengths to underscore that the longstanding principle of proportionality continues to apply; compensation for pain and suffering should be proportionate to the injury suffered.

However, The Bar of Ireland remains concerned about unintended and perhaps unforeseen negative consequences for citizens seeking redress. The balance of power between corporations and individuals will need to be closely monitored. There needs to be a structure allowing for the formal monitoring and reporting of court claims and insurance costs when these Guidelines come into force. This applies to private entities and State bodies.

Litigation serves an important function

Notwithstanding that the Report (and insurance data) confirms that only 0.54% of cases conclude via the courts, litigation does in fact serve an important function. It has a vindicatory function, vindicating the rights of citizens, but it also allows for compensation to be paid to restore the injured person to her original position. It also serves to set and raise standards of health and safety in workplaces and public spaces. It leads to safeguards in healthcare. All of this is of benefit to the public and ensures both diligence and innovation in minimising negligent injuries and the consequent suffering and hardship that such injuries can cause.

Holding insurers to account?

The focus must now shift towards whether the new Guidelines will be the silver bullet promised by many to tackle rising insurance costs (premia). Let us not forget that the insurance of 'risk' is a business, and a very profitable business. The fear on the part of those advocating for injured parties, whose welfare post injury is often dependent on fair compensation for the disabling injury caused by the negligence of others, is that the alleged obligation on compensators, whether the State itself or insurance companies, to have a parallel reduction in premia matching the reduction in awards, is somewhat oblique.

Minster for Justice Helen McEntee TD has stated that that she "hopes the new Guidelines will have an impact on the award of damages in personal injuries cases and bring down the cost of insurance". Minister of State Sean Fleming TD said that it is "now an imperative that we hear firm public commitments by insurance companies that Irish customers will benefit from any savings". Robert Troy TD said he "would expect to see insurance companies passing on the benefits to their customers".

A real lacuna in oversight is the failure to put in place a system of monitoring the consequences of the new Guidelines. Without close scrutiny, it will not be possible to determine whether the benefits of reduced awards are being passed on by insurers. This ought to be done prior to the coming into effect of the Guidelines themselves.

Conclusion

The Judicial Council in its own FAQ asks: "Will this reduce the cost of insurance?" and goes on to note the lack of scientific and statistical linearity between injury claims and the cost of insurance, stating that regardless of the relationship, the impact "will depend upon whether any savings which will accrue to the insurance companies as a result of the Guidelines will be passed on to policyholders". We shall simply have to wait and see.

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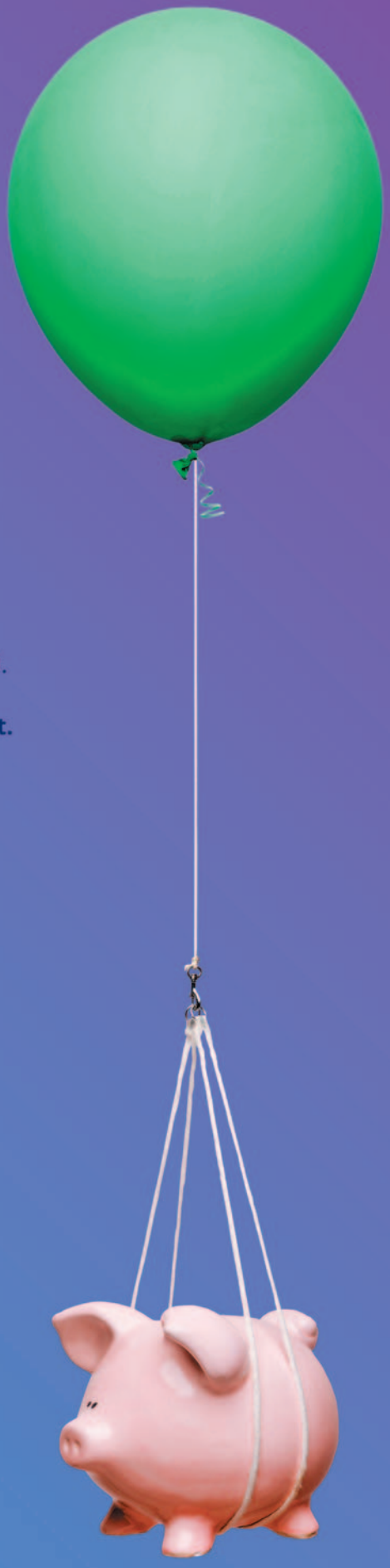
what's the simplest way to save up to 40% of income tax?

Put money in your pension



Even the terms and conditions are simple. The earnings limit is €115,000 and the amount of relief varies according to your age (see below).

With a pension, you save tax when you put money in and you save tax when you take it out. You can take up to 25% out tax free (subject to conditions) and all investment gains accumulate tax free within your fund.

Remember, prosperity needs to be planned - especially for retirement. Be sure to avail of our help.

The Bar of Ireland Retirement Trust Scheme

Open to all members of the Law Library under 75 years of age.

Age	Maximum tax relief on pension contribution (as a percentage of earnings)
Up to 29	15%
30-39	20%
40-49	25%
50-54	30%
55-59	35%
60 and over	40%

Contact your Mercer Bar of Ireland Pension Team on **01 636 2700** or Donal Coyne via email at **donal.coyne@mercer.com**.

www.mercer.ie

A business of Marsh McLennan