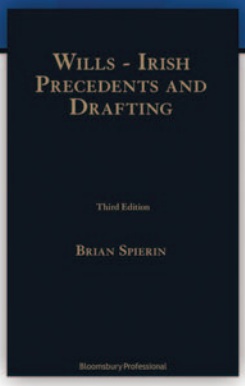
THE BAR
REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

Volume 26 Number 1
February 2021

Drug driving: recent developments

New titles
from Bloomsbury Professional



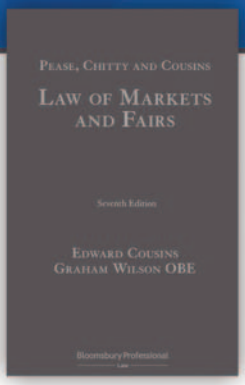
Wills – Irish Precedents and Drafting

By Brian Spierin

3RD EDITION

9781526512239
Dec 2020
€235.12

This title provides precedents drafted in a straightforward, modern style and annotated where necessary. Now in its third edition, it has been completely revised and includes case law up to date as of September 2020 and relevant legislation referenced up to 2020. Significant additions include the impact of recent divorce law reform and a new chapter on Mutual Wills.



Pease, Chitty and Cousins: Law of Markets and Fairs

By Edward Cousins, Graham Wilson

7TH EDITION

9781526511287
Nov 2020
€221

This title contains an in-depth commentary and analysis on the history of market and fair rights together with current developments in the law relating to franchise and statutory markets in the UK. Given that the law in England and Wales is inextricably linked with the law in Ireland, the "Irish dimension" is fully considered in chapter 14 and the Appendices includes both the UK and Irish statutes.

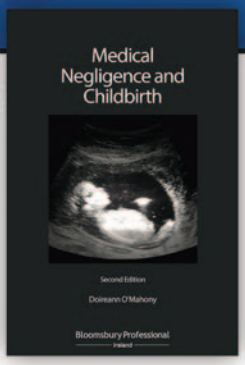
Drug Offences in Ireland

By Garnet Orange

2ND EDITION

9781526518392
Jan 2021
€155

This concise, practical text deals with all the key areas of drugs law including sentencing, possession, importation, stop and search, search warrants, entrapment, evidence and defences. This new edition contains numerous significant updates, including a new chapter on Powers for Investigating Drugs Offences.



Medical Negligence and Childbirth

By Doireann O'Mahony

2ND EDITION

9781526515995
Jan 2021
€225

With contributions from world-leading experts in obstetrics, gynaecology, neonatology and other related specialties, this book will equip legal practitioners with the knowledge they need to advise on complex birth-related injuries. The second edition contains ten brand new chapters covering issues including termination of pregnancy, autism, inquests and fatal injuries actions.

Bloomsbury Professional
Ireland

TO ORDER
Visit: **bloomsburyprofessional.com**
Email: **bpireland@bloomsbury.com**

The Bar Review
The Bar of Ireland
Distillery Building
145-151 Church Street
Dublin DO7 WDX8

Direct: +353 (0)1 817 5025
Fax: +353 (0)1 817 5150
Email: aedamair.gallagher@lawlibrary.ie
Web: www.lawlibrary.ie

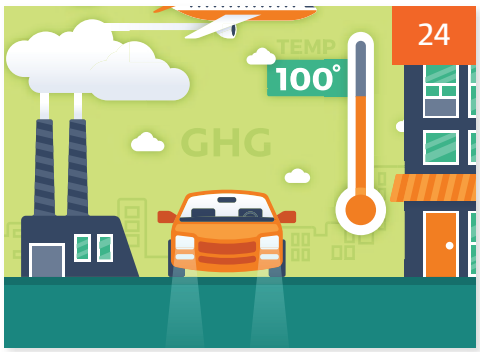
PUBLISHERS

Published on behalf of The Bar of Ireland by Think Media Ltd

Editorial: Ann-Marie Hardiman
Paul O'Grady
Colm Quinn
Design: Tony Byrne
Tom Cullen
Niamh Short
Advertising: Paul O'Grady

Commercial matters and news items relating to *The Bar Review* should be addressed to:
Paul O'Grady
The Bar Review
Think Media Ltd
The Malthouse,
537 NCR, Dublin DO1 R5X8
Tel: +353 (0)1 856 1166
Fax: +353 (0)1 856 1169
Email: paul@thinkmedia.ie
Web: www.thinkmedia.ie

www.lawlibrary.ie



Message from the Chair 4

Editor's note 5

News 5
Bar CPD consultation
Resilience at the Bar
Justice Week 2021

News features 10
Member survey highlights ongoing issues 10
New advertising regulations for barristers 13

Law in practice
Revoking a naturalisation certificate and the short waking life of Section 19 14

Interview 18
Making the system work

Legal update i

Law in practice
Drug driving: recent developments 21
Climate change and the Supreme Court 24

Closing argument 28
Vulnerable witnesses – a lot done, more to do

Papers, editorial items, and all queries regarding subscriptions should be addressed to:
Aedamair Gallagher at: aedamair.gallagher@lawlibrary.ie

Looking to the future

While lockdowns continue to impact on barristers' work and lives, The Bar of Ireland is embarking on a strategic review in order to better plan for the future of the profession.

We are now one month into 2021. The new year commenced on a very difficult footing, with the entire island faced with high levels of Covid-19, although over the past few weeks, it is reassuring to see a downward trend in the number of positive cases being reported. It would appear that progress is slow, and that further upheaval seems imminent in the coming months.

Key workers vaccination

Members will have seen reports in the media of our call to have barristers designated as 'key workers' for the purpose of receiving the Covid-19 vaccine. I corresponded with An Taoiseach, Micheál Martin, in early December highlighting that barristers are deemed to be an 'essential service' providing an essential and necessary service in the administration of justice and upholding the rule of law. The Government, the judiciary and the Courts Service have ensured that the courts remain open at this critical time to ensure continued access to justice, and the protection and vindication of constitutional rights.

Even under the highest level of public health restrictions, our members continue to provide representation in cases involving personal liberty, domestic violence, cases involving minors, and urgent civil cases such as injunctions, habeas corpus and wardship applications.

While the Council does not wish to displace any other priority groups who require the vaccine, it is vital that barristers are identified as one of the occupations to be defined under the 'key worker' category so that they can safely continue to perform their role in the months ahead.

Member survey and support

My thanks to the members who completed the member survey in December 2020 to gain insights into how Covid-19 has impacted on our profession and how we are coping.

A more detailed article on the survey results is included in this edition of *The Bar Review* and the feedback has assisted the Council in taking decisions on the measures needed to further support our members as the crisis continues.

Members will now be aware of my communication, which sets out some detail of a membership subscription credit, recognising the impact of the reduced operation of the courts and consequently the reduction in opportunities for members to provide their professional services.

It has been a challenging task to strike a balance in the provision of a meaningful financial support for members while at the same time managing the finance of the organisation so that we can continue to provide the full range of services for members. My sincere thanks to our Treasurer, Seamus Clarke SC, ably supported by the finance team, who have worked tirelessly to achieve this goal. The Council will continue to monitor the situation.

Your views on the future of our profession

Members will recall that the Council appointed EY to conduct a strategic review to assess the future likely landscape and conditions under which the profession can continue to provide and expand its role in the provision of legal services, having regard to the core value of an independent referral bar. The review will include:

1. an assessment of the future market, demand and expectations for the services of barristers including a diagnosis of the environmental, regulatory and competitive situation;
2. a detailed plan, setting out recommendations on where the Council should focus its priorities; and,
3. an analysis of how best to maximise organisational resources in furtherance of those priorities.

All members will receive an invitation to have their say through a survey that is being conducted by EY/Red C in February 2021.

I am very aware that the Council is in danger of causing survey fatigue; however, this is an important initiative to assess the future direction of our profession and I urge all of you to make your views known by completing the survey.

Unfortunately a large cohort of members pay passive heed to what the Council is doing in the interest of our profession, so please, please take this one active step this year and complete the survey. It is in all of our interests to ensure that the response rate is as high as possible so that we can be assured that any decisions taken on your behalf are in keeping with the views and attitudes of our membership. It is another avenue through which members can express their concerns. You might also take time to encourage colleagues to also complete the survey.

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; and,
- please work from home where possible.

Please stay safe.

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

Reform on the horizon

This edition looks at reforms in the area of personal injuries and the treatment of vulnerable victims.

The recent judgment of the Supreme Court in the Climate Case has far-reaching repercussions for the manner in which the Irish State must face up to its obligations to reduce greenhouse gases. However, the judgment also has significant implications for the litigation of public interest cases and it provides some indication of how the Court is likely to approach the issue of unenumerated constitutional rights in to the future. In this edition, we address the key issues for public law litigation. Just one year into her role as Chief Executive of the Personal Injuries Assessment Board, Rosalind Carroll sets out her stall in relation to proposed reform of the system around damages for personal injuries. She discusses the Government's Action Plan for Insurance Reform, the implications of the Book of Quantum moving out of the PIAB's remit, and her plan to use the data on personal injuries cases to better inform stakeholders and the public.

The prosecution of drug driving has been facilitated in recent years by legislation specifically targeting the use of performance-affecting drugs while at the wheel. Gardaí are now empowered to administer roadside drug tests while specific offences have been introduced in relation to having a concentration of certain drugs in the blood above a prescribed level. We examine how these measures are operating in practice.

Elsewhere, we analyse recent Supreme Court cases relating to the revocation of citizenship. Finally, we explore the numerous unresolved issues that arise when prosecuting offences relating to vulnerable victims. The momentum from the Minister for Justice, Helen McEntee TD, towards the introduction of legislation for pre-trial hearings before the summer is a welcome step in this regard that should increase efficiency in the prosecution of all criminal trials.

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

Have your say! Member consultation on new CPD requirements and competency framework

Over the past year the Education and Training Committee has been working to review the CPD requirements for membership. Your views as a member are essential before the requirements of the new CPD scheme are finalised. A member survey will be circulated in late February inviting your input.

The survey is available via https://rebrand.ly/CPDsurvey or using this QR code.

On-demand CPD relaunch

The new CPD Playback page on www.lawlibrary.ie has been re-designed to be more efficient and user-friendly. You can now easily filter webcasts by year and area of law.

The importance of resilience and self-care

Karen Belshaw.

Anxiety, low job satisfaction and isolation topped the poll in a recent well-being survey by The Bar of Ireland. Such symptoms may be exacerbated by the global pandemic, which brings restrictions and changes to the usual routine, but there are many self-care strategies that can help manage stress and promote well-being.

To paraphrase Viktor Frankl, when you can no longer change your circumstances, you must change yourself (*Man's Search for Meaning*).

The Bar of Ireland recently held a well-being webinar, where Karen Belshaw, MSc Psych & Well-being, presented on resilience and self-care to members of the Law Library with the aim of sharing effective coping skills, partly in response to the survey.

Well-being has two distinct aspects: the cognitive – how we think about ourselves; and, the affective – how we feel about ourselves. With this in mind, Karen addressed mindful awareness, confidence, intrinsic motivation, perception, self-care routines, psychosocial factors, and communication.

Mindful awareness includes being fully present and cognisant of what you are experiencing, as opposed to falling foul of perceptual expectancy and assuming a negative result based on prior experience. There was a general consensus that barristers often experience the need for certainty and the desire to control outcomes, which can lead to stress and anxiety. Practising mindful exercises on a daily basis over a six-week period greatly enhances cognitive control, reduces anxiety, and enables heightened problem-solving skills (Seligman, 2011). Studies show that it is the perception of the event that causes stress levels to rise, not the event itself (Cacioppo *et al.*, 2015; Guo *et al.*, 2013). Coping skills to manage psychosocial factors included the subjective evaluation and management of stress according to your own needs. The acceptance of limitations resonated with many participants and proved the most popular of coping skills. Regularly asking yourself what can you do about something, rather than what you can't do, aids behaviour change from problem to solution focus.

The self-care coping skills (Fritz *et al.*, 2011) highlighted the need for a regular routine of physical exercise, sleep, diet, and cognitive coping skills. There is no one size fits all, so each individual must take the time to design their own well-being plan.

Well-being is more than the absence of negative conditions and feelings. It is a complex construct with many components. The hedonic approach suggests that it is the subjective evaluation of life satisfaction and positive affect. Eudemonic concepts of the good life suggest that well-being is about each individual becoming a fully functioning person leading to an existential existence.

Aristotle held that the ultimate aim in life is to reach one's true potential, to find a balance between deficiency and excess, and to make the most of one's talents. This pandemic will pass, life will resume, so use this time to restructure and get ready.

For more information on workshops and individual well-being appointments, contact Karen Belshaw on 087-677 9883, Karen@stresstraining.ie, or go to www.stress-management-ireland.com.

THOMSON REUTERS
ROUND HALL™

ISBN: 9781858006895
December 2020 | Hardback | £445

Simons on Planning Law

3rd Edition

David Browne

In the long-awaited new edition of **Simons on Planning Law**, David Browne updates this comprehensive analysis of the area of planning law in Ireland to include developments in national and European case law since the previous edition, and reflects legal developments in the area since 2007.

Significant statutory changes have occurred since the previous edition, including the Planning and Development (Amendment) Acts of 2010, 2015, 2017 and 2018, as well as the Planning and Development (Housing) and Residential Tenancies Act 2016, all of which are dealt with in this volume.

In addition, there have been over 100 statutory instruments and numerous decisions of the CJEU and national courts in the area of planning law in the intervening period, between editions.

Features:

- Includes all relevant statutory provisions and case law.
- Provides a detailed analysis of the complex area of planning law.
- Enables practitioners to understand both substantive planning law and the procedural rules in judicial review applications, appeals and costs applications.

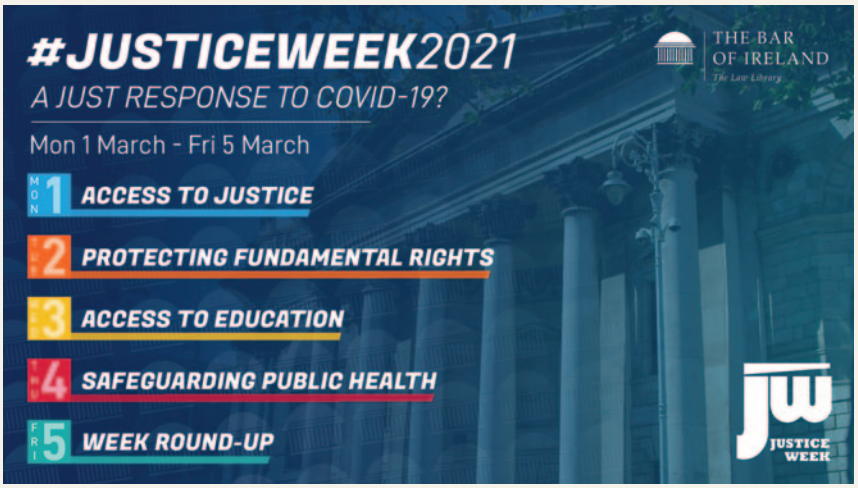
This title is also available as an eBook on Thomson Reuters ProView™

PLACE YOUR ORDER TODAY

pauline.ward@thomsonreuters.com | +44(0) 345 600 9355

THOMSON REUTERS®

Get involved in Justice Week 2021



Following the success of our inaugural Justice Week in 2020, preparations are now underway for Justice Week 2021, which will run from March 1-5. We hope to involve as many voices in the legal, policy and justice sector as possible.

What is Justice Week?

Justice Week is a joint awareness campaign of the legal professions across the four jurisdictions (Scotland, Northern Ireland, Ireland, and England & Wales). It aims to promote an understanding and awareness of access to justice and the rule of law. The focus for 2021 will be 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. A key concern arising from the introduction of emergency measures in response to the pandemic is the constitutionality and proportionality of restrictions imposed. The rule of law and a robust justice system are vital to ensuring a co-ordinated and effective society-wide response to a pandemic, one that instils public trust, protects rights, addresses inequities, upholds accountability, and ensures a balanced and proportionate response. The campaign will touch upon a number of themes throughout the week, including access to justice, access to education, and freedom of movement. The Bar of Ireland will host a series of online activities including a panel discussion with legal and policy experts on the limitations imposed on fundamental rights during the pandemic, and an interuniversity debate comprising students from the main university law schools across Ireland.

How can you participate?

Justice Week is a valuable platform on which your organisation can promote or highlight any of its justice-related activities, policy priorities, research or other outputs, particularly where Covid-19 is concerned. Engage your community/following on social media using the umbrella hashtag #JusticeWeek2021.

To inquire further about how you/your organisation can get involved, please contact Aedamair Gallagher, Policy & Public Affairs Manager, at aedamair.gallagher@lawlibrary.ie.

Joint event with OUTLaw

OUTLAW network

The OUTLaw Network was founded in 2018, with the aim to generate discussion and debate through various events in an effort to promote and foster the inclusion of LGBT+ individuals and allies across the legal sector in Ireland. The Bar of Ireland has been involved since 2018 and the first joint event by OUTLaw and The Bar of Ireland took place on Thursday, January 21, 2021. A large audience joined online and the session was moderated by Sean O'Sullivan BL.

Thanks to the speakers – Susan Ahern BL, Richie Fagan, President, Emerald Warriors Rugby Club, Moira Flahive BL, and Maura McNally SC, Chair, Council of The Bar of Ireland – who led a highly engaging discussion on the topic of LGBT+ visibility and inclusivity in sport.

More information on the OUTLaw network is available on www.outlawnetwork.ie.

LAW SOCIETY OF IRELAND

LAW SOCIETY DIPLOMA CENTRE

APPLY NOW FOR SPRING 2021

POSTGRADUATE COURSES TO SUIT A BUSY SCHEDULE

Leaders in legal education with professional focus and practical insight

- Flexible learning options
- All sessions are live, interactive and online
- Evening and weekend classes
- All classes are recorded and available to view on demand

COURSES AVAILABLE IN SPRING 2021

Diploma in Commercial Litigation	20 January 2021	€2,600
Diploma in Aviation Leasing and Finance	28 January 2021	€3,000
Certificate in Strategic Leadership for the In-House Lawyer	29 January 2021	€1,650
Certificate in Company Secretarial Law & Practice	2 February 2021	€1,650
Diploma in Employment Law	12 February 2021	€2,600
Certificate in Data Protection Practice	17 February 2021	€1,650
Diploma in Healthcare Law	25 February 2021	€2,600
Certificate in Charity Law & Trusteeship	26 February 2021	€1,650
Certificate in Commercial Contracts	6 March 2021	€1,650
Certificate in Enforcement for Public Bodies (NEW)	6 April 2021	€1,650

APPLY NOW

E: diplomateam@lawsociety.ie T: 01 672 4802 W: www.lawsociety.ie/diplomacentre

Member survey highlights ongoing issues

The findings of the most recent member survey confirm that the disruption to court business continues to have a detrimental impact on members' livelihoods, as well as giving rise to serious barriers for clients seeking access to justice and the resolution of their disputes.

With a response rate of approximately 15%, and reflecting wider Bar demographics (42% female, 86% Junior Counsel; **Figure 1**), the results of The Bar of Ireland's latest member survey provide a useful basis for understanding key trends and developments across the profession.

Impact on practice

The survey tracks member sentiment from our May 2020 survey, with respondents reporting continuing concern in relation to future viability of practice. Over 52% of the profession identified the viability of practice as the most significant challenge over the next 12 months (**Figure 2**). While in May 2020, responses to this question were more pronounced taking the Bar as a whole, the issue continues to impact disproportionality on those in years one to seven, 70% of whom reported it as significant and unmoved since May 2020 (**Figure 3**). Unsurprisingly, the key driver of practice and income is court activity. With backlogs arising due to restrictions in physical hearings, the survey results highlight the need for the Courts Service and the Department of Justice to 'turbo charge' preparations for alternative settings, modifying existing ones and streamlining the hybrid possibilities of remote hearings. Developments in respect of the High Court personal injuries hearings, as well as certain Circuits adopting a remote capacity, will be welcome, and reflect the progress made, in particular in the Superior Courts. The task one year on is to replicate that approach across all court activity, while ensuring that physical hearings can also continue to be relied upon.

Member feedback on this issue reflects the submissions made by Council, that fewer hearings and lack of physical hearings is adversely impacting on issues such as income, formation of younger practitioners, and client welfare. The transformation programme of a digital Courts Service must include the perspectives and experience of practitioners, in particular as to how physical court activity will co-exist, and accessibility for all court users. In response to these findings, and reflecting an awareness over the past number of weeks and

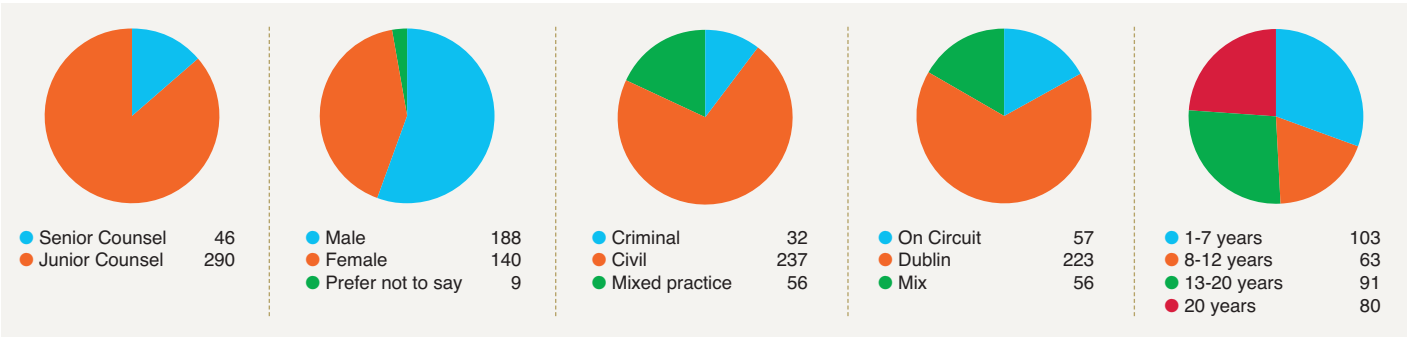


FIGURE 1: Demographics of survey responses.

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

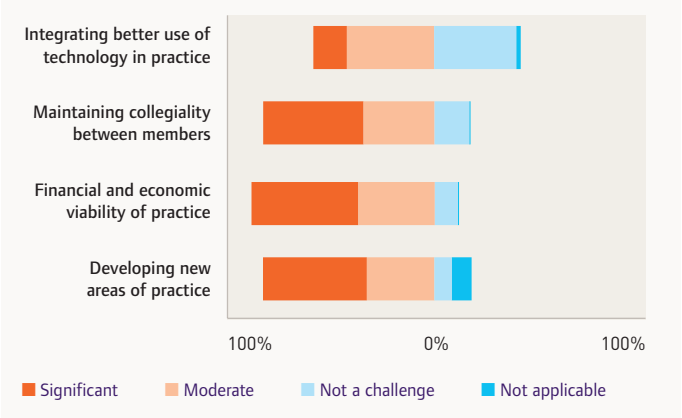


FIGURE 2: Challenges anticipated by practitioners in the coming year.

Economic viability – significant – by years:

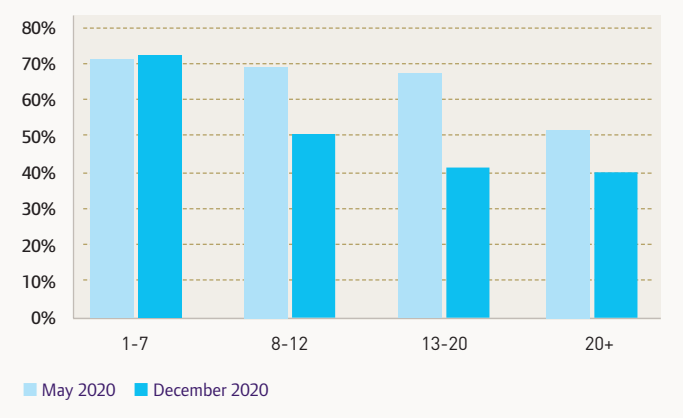


FIGURE 3: Economic impact December 2020 versus May 2020 by year of practice.

months of issues affecting members, the Council has already commenced a process of putting in place a second subscription credit. A fund of €1.6m has been earmarked and details of the credit are being communicated directly to members. This second credit also acknowledges the collective strength, solidarity and value of Law Library membership. 'Maintaining collegiality at the Bar' and 'Developing new areas of practice' (both identified as significant by just under 50% of respondents; **Figure 2**) reflect the store placed on the Law Library environment and the traditional networking opportunities it provides. The challenge of developing new areas of practice is likely to be driven by necessity, as traditional areas of work have been disrupted, but also points to a spirt of entrepreneurship and innovation being applied to the barrister qualification. The message from these results reflects the continuous call to Council – how are we supporting our members, and what more can be done?

Income

Asked to assess how their income has been impacted on a full-year basis, of the respondents reporting a decline in income, 45% estimate the drop to be up to 50%, the majority of those anticipating it to be between 30% and 50%. Those in years 13-20 make up the largest cohort of that 30-50% drop (35%). Less than 10% anticipate the most severe drop in income (a drop of 80%+). In May 2020, over 30% reported such a drop over the previous two months. While some may see it as a cause of some hope and optimism that the assessment of income drop has moderated, a word of caution: members' fee collection cycle is by its nature many months behind the delivery of service. As such, it could be the case that the full economic brunt has yet to wash through the system and be realised.

Well-being

The issue of well-being and mental health continues to find due prominence across debates and sectors over the last year, as well as its relationship to how people work sustainably and safely. The Bar of Ireland has taken some steps in recent years to focus on dignity and supports as members practice, and this agenda continues to be developed.

'Anxiety' and 'low job satisfaction' were reported as the two most acute conditions, with respondents having experienced them "very often" in the past months (**Figure 4**). Anxiety experienced during the pandemic is a natural reaction; however, the comments indicate that again, much of that anxiety has its genesis in the courts largely halting some categories of business, the safety of the court workplace, and a fear of continued restrictions. Similarly, 'low job satisfaction' might be seen as a proxy for the chaos and lack of certainty that has pertained to many areas of practice in recent months, and as members reposition their work context. Breaking the results down by years at the Bar, we can see 'burnout' as a dominant feature of the younger Bar. Anxiety pervades all cohorts, but as members progress, low job satisfaction becomes increasingly apparent. The survey validates continued work on the part of the Equality & Resilience Committee to strengthen and develop member-specific supports and resources, and to create a culture of understanding and empathy at the Bar. Almost 40% support the proposal for a programme of well-being events and supports, which calls on a whole-of-organisation approach.

Satisfaction with The Bar of Ireland services

Understanding how key Bar of Ireland services are received by the membership assists us in measuring both the quality and design of services. Members expressed particular satisfaction with the Library, CPD offerings and communications in recent months (**Figure 5**). While technology has replaced key face-to-face interactions for us all, it has also allowed members who may have other obligations, those located outside the Law Library environs, and those who have a need for asynchronous access to participate in activities and access services. Each of the categories of services raised saw a 20% increase on May 2020 (noting that 'Practice Support and Fee Recovery Supports' were only established in the summer of 2020). As members and staff continue to develop expertise in the use and management of technology and its application to the Bar environment, it is hoped that we can build on the improvements to date.

Access to justice

Court services are, of course, a public service, and court users do not have a lobby group per se. As a consequence, the impact on the public, and in

In the past number of months, I have experienced:

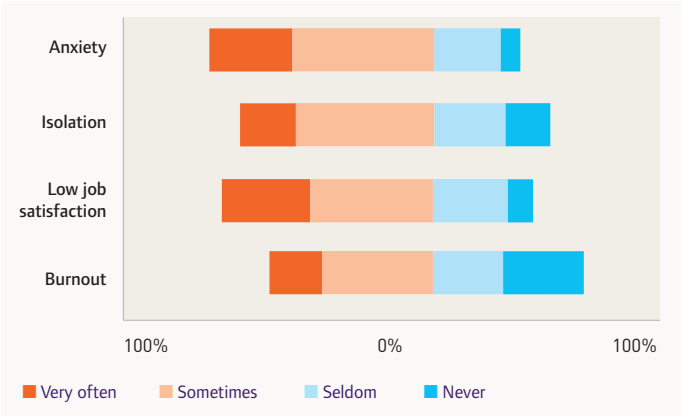


FIGURE 4: Impact on well-being.

Please indicate your satisfaction with each of the following in recent months:

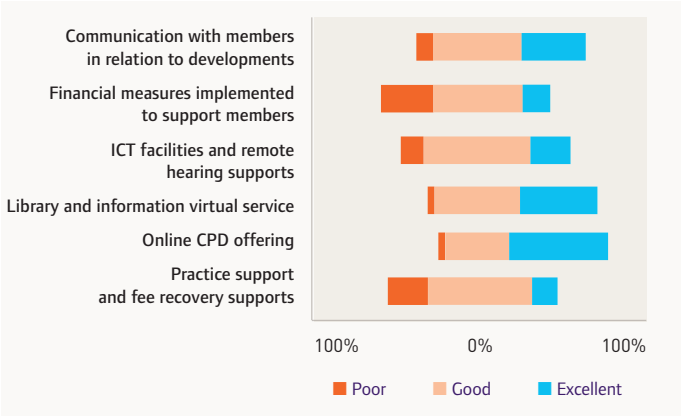


FIGURE 5: Member satisfaction with Bar of Ireland supports.

Please consider how the following experiences might apply to your clients in the past number of months:

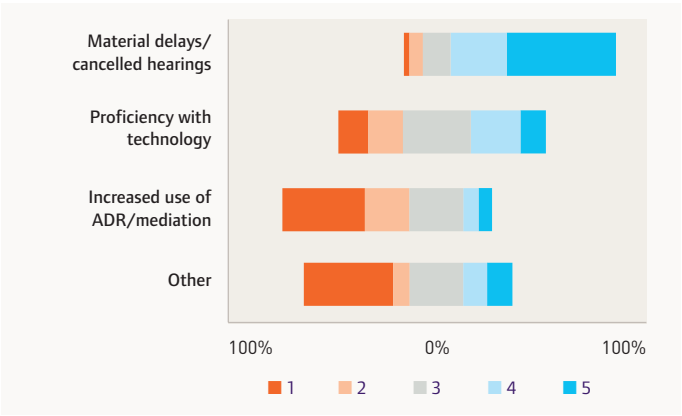


FIGURE 6: Impact on clients and access to justice.

particular the relatively unheard section of those who rely on the courts during these months, has yet to be fully heard. The progress made in relation to urgent family and child law cases (including domestic violence) is a credit to all agencies and practitioners involved. However, citizens with civil and criminal matters before the courts continued to be impacted over the past year.

Members were asked to rate, overall, how their clients have been impacted (**Figure 6**). Some 65% answered a high rating (4-5), where 5 represents "severely impacted".

The categories of impact include material delays/cancelled hearings (75% reported a high rating), followed by proficiency with technology (36% reported a high rating).

The challenges of the Pexip platform and remote hearings support these conclusions, with almost 40% rating as "poor" the impact it has on interactions with other parties, and the effectiveness of managing briefs.

The testimonies of members on this theme include:

- consultations occurring on the side of the street as facilities in the courts remain unavailable;
- delayed damages and deferred litigation impacting on client welfare, both emotional and economic;
- repeated adjournment of motions/hearings damaging the standing of the courts;
- challenges of technology in case preparation, client confidentiality and instructions; and,
- court facilities not always Covid compliant or available.

Conclusion

With almost a year now passed from the date of the pandemic starting, it is regrettable that the survey results convey a view among members that the court system in the main appears still in reactionary mode. Clear, direct and proactive communications as to the 'what', 'when' and 'how' of a modernised courts system would embolden both practitioners and court users as to their future welfare. Until then, a degree of angst and frustration pervade.

The results of this survey offer some seeds of optimism, however, in respect of practitioners seeking to prepare for new modes and sources of work, and by extension a moderation in view of how incomes and practice may be disrupted over the long term.

How will the pandemic play out in advance of a population-wide vaccination programme? How will the longer-term impacts of the crisis manifest in the economy? What is the political will to ensure that our justice and courts service systems are strengthened and resilient?

These are some of the external factors that will define a great deal of 2021. The Bar of Ireland continues its mission to support the resumption of court business, safely, to the highest degree possible.

New advertising regulations for barristers

New regulations in respect of advertising by legal practitioners came into effect on December 18, 2020.

Dara Hayes BL

Barristers and solicitors are now governed by the same rules when it comes to advertising. These rules are contained in the Legal Services Regulation Act 2015 (Advertising) Regulations, 2020 (SI 644/20).

Prior to December, advertising by barristers had been governed by our Code of Conduct and guidelines published by the Bar Council in May 2008. Those guidelines have been rescinded and the Code of Conduct is now framed by reference to the Legal Services Regulation Authority (LSRA) Regulations. While the change is significant, it is perhaps more evolutionary than revolutionary. The guidance that had been provided about what might be included in an advertisement is now gone. However, the rules prohibiting certain content remain broadly the same as before. What follows is a brief guide to the new rules, but the Regulations should be read by all practitioners.

Lawful advertisement

The general premise of the Regulations is that it is lawful for legal practitioners to advertise, whether they be individuals, partnerships or groups of practitioners sharing facilities, premises, or practice costs. An advertisement is given quite a wide definition and includes oral, written and visual communications intended to publicise or promote the practitioner in question in relation to the provision of legal services. Under Regulation 4 advertisements shall not:

- be likely to bring the profession into disrepute;
- be in bad taste;
- reflect unfavourably on other practitioners;
- be false or misleading;
- be published in an inappropriate location (hospitals, clinics, funeral homes and suchlike); or
- expressly or implicitly solicit or encourage personal injury claims (although the term "personal injuries" and other such terms may be included in an advertisement).

The use of terms such as "no foal no fee" or "first consultation free" are also prohibited, as is any suggestion that there is no risk to a client of having to pay costs. The Bar Council's previous guidelines had contained a prohibition on advertising by reference to a barrister's success rate. A similar prohibition on legal practitioners advertising by reference to success rate has been included in these Regulations at the urging of The Bar of Ireland, it not having been included in the original draft regulations. The thrust of the submission was that this prohibition is necessary to protect the interests of litigants and their access to justice and effective legal representation, and to guard against any undermining of the cab-rank principle by which we practise, which principle operates in the interest of litigants.

Confidentiality and publicity

Advertisements cannot breach the duty of confidentiality owed to clients without the express prior consent of the client. An exception to this is in relation to matters already in the public domain. It is also permitted to state that you acted in particular proceedings.

Practitioners often, in conference programmes or social networking sites for example, list significant cases in which they have appeared. This practice is permitted by the Regulations, although it is provided that one's role is not to be overstated.

The purpose of an advertisement, for the purpose of the Regulations, is to publicise or promote a practitioner in the provision of legal services. Where the LSRA deems that the publication of a book or article, or the giving of a lecture, is primarily for publicity or promotion rather than for imparting legal information, such activity can fall under the Regulations. The indicia of publicity and promotion can include: the extensive giving of free copies of books; paying to have your article published or to deliver your lecture; and, the repeated giving of the same lecture or publication of the same article. It may herald the end, for lawyers, of the single transferable speech.

Any advertisement must state by or for whom it was published. If not, it will be deemed to have been published by the practitioner or practitioners that it seeks to publicise or promote.

Breaches of the regulations

A breach of the Regulations can be dealt with by enforcement under the Regulations. It can also be treated as misconduct under Part 6 of the Legal Services Regulation Act, 2015. The LSRA can investigate any alleged breach either on foot of a complaint or on its own motion. Where it finds that an advertisement is in breach of the Regulations, the Authority can issue directions and can seek undertakings in relation to future advertising. It can also apply to the High Court, should it consider it necessary, to enforce the Regulations.

Since its submission to the Competition Authority in 2005, up to and including the submission made to the LSRA last November, The Bar of Ireland has consistently expressed the view that advertising can be to the benefit of both legal practitioners and their clients. These Regulations appear to strike a balance between promoting the good that advertising may bring without undermining the interests of justice.

Revoking a naturalisation certificate and the short waking life of Section 19

Two recent Supreme Court judgments have raised important issues around the dividing line between executive and judicial functions, and the constitutionality of s. 19 of the Irish Nationality and Citizenship Act 1956.*

Aoife McMahon BL

Two cases of note in 2020 concerned s. 19 of the Irish Nationality and Citizenship Act 1956 (the INC Act), which provided for the revocation of a naturalisation certificate: *Habte v Minister for Justice*;[1] and, *Damache v Minister for Justice*.[2] In the latter case, the Supreme Court declared the section unconstitutional. This article will analyse each case before considering two themes that are dealt with in the judgments: prematurity as a preliminary issue in judicial review proceedings; and, the dividing line between executive and judicial functions.

Section 19 (1) of the INC Act provides, *inter alia*, that the Minister may revoke a certificate of naturalisation if he is satisfied that its issuance "was procured by fraud, misrepresentation whether innocent or fraudulent, or concealment of material facts or circumstances….". Section 19(2) provides that the Minister must give notice of his intention to revoke and for the right of that person to apply for an inquiry as to the reasons for the revocation. Section 19(3) provides that on application for such an inquiry, the Minister shall refer the case to a committee of inquiry appointed by the Minister and the committee shall report their findings to the Minister.

While this section had been on the statute book since 1956, the Minister for Justice only appointed a committee of inquiry pursuant to s. 19(3) in 2018. This committee of inquiry heard its first oral hearing on December 11, 2018, at its offices in Tipperary.[3]

Habte v Minister for Justice

The applicant in *Habte* was born in Ethiopia and granted a certificate of naturalisation in 2015. Her date of birth was the date of birth recorded on her Ethiopian passport. However, her birth certificate contained two different

dates of birth, which she explained was due to differences between the Ethiopian and Gregorian calendars. She later became concerned that the date recorded on her Irish passport had recorded the incorrect date of birth but the Minister for Justice refused her application to have this error in her naturalisation certificate rectified. The applicant was granted leave to seek judicial review of the decision refusing to amend her naturalisation certificate. The Minister for Justice then notified her of his intention to revoke her naturalisation certificate on the basis that she had submitted false or misleading information with her application. She was advised of her entitlement to seek an inquiry into the reasons for this proposed revocation pursuant to s. 19 of the INC Act. The applicant did not seek to avail of such an inquiry but took a second set of judicial review proceedings seeking an order of *certiorari* of the proposal to revoke her naturalisation certificate and a declaration that s. 19 was unconstitutional.

Ms Habte was successful in her first set of judicial review proceedings in both the High Court and the Court of Appeal. Humphreys J. found that there was an unenumerated Constitutional right to have one's identity correctly recognised by the State and this included a person's date of birth. This was upheld in a separate concurring judgment of Power J. in the Court of Appeal. The Court of Appeal (Murray J.) upheld the remaining grounds of the first judicial review. In sum, while it was contrary to "absolute clarity and certainty around the person's citizenship"[4] to have an initial certificate and an amended certificate with the same registration number in parallel existence, this error could be rectified by the cancellation and re-issue of a naturalisation certificate.

As regards the scope of s. 19(1) and in particular an "innocent" misrepresentation or "material" concealment giving rise to a ground for revocation of a naturalisation certificate, this was to be construed in light of the prior words "procured by". There must be a certain causal connection between the granting of the naturalisation certificate and the misrepresentation or concealment such that the certificate would not have been granted 'but for' this misrepresentation or concealment. In the second set of proceedings, which will be considered further below, the Court of Appeal rejected the arguments that the Minister had acted unlawfully and that the section was unconstitutional because of the lack of judicial oversight over any revocation.

Damache v Minister for Justice

The facts of *Damache v Minister for Justice* were somewhat different. Mr Damache was granted a certificate of naturalisation in 2008. Following an eventful litigation history in the State,[5] while on a trip to Barcelona he was extradited to the US and pleaded guilty to materially assisting an Islamist terrorist conspiracy. He was sentenced to 15 years' imprisonment, with credit for furnishing a consent to be deported to either Ireland or Algeria on his release.

The Minister for Justice then issued him a proposal to revoke his naturalisation certificate pursuant to s. 19(1)(b) of the INC Act on the grounds that he had failed in his duty of loyalty to the nation and fidelity to the State, having pleaded guilty to a terrorist offence. The applicant initiated judicial review proceedings seeking, inter alia, *certiorari* of the proposal to revoke his naturalisation certificate and a declaration that s. 19 was unconstitutional.

Prematurity as a preliminary issue in judicial review proceedings

In respect of the second set of proceedings in *Habte*, the Court of Appeal (Murray J.) clarified the distinctions between whether a justiciable decision existed, prematurity, and the availability of an alternative remedy.[6] The critical question was whether the Court's discretion was properly applied to enable review given that there was a statutory process available in the course of which the applicant could make her case prior to a final decision.[7]

Leaving the constitutional challenge aside, the grounds in *Habte* on which *certiorari* of the proposal to revoke was sought notably included that the Minister acted unlawfully in initiating that procedure because he failed to afford the applicant fair procedures before so doing, and that the Minister failed to individually consider the applicant's circumstances and the proportionality of the decision. The Court of Appeal held that once fair procedures were afforded over the full course of a multi-stage decision-making process, this was sufficient.[8] These were "quintessentially, issues to be resolved within and following the inquiry when the facts have been determined … it is following any decision to revoke that those grounds of challenge should be agitated".[9]

In relation to the constitutional challenge to s. 19, the Court of Appeal reviewed the caselaw both for and against the proposition that such a challenge could be made prior to the commencement of the s. 19 process. Murray J. noted that the arguments raised by the applicant could be resolved within the alternative remedy of the inquiry process. He noted that there was a certain incongruity in considering the constitutional argument at this juncture given that if it was heard following the s. 19 process and the applicant succeeded on non-constitutional grounds, the Court would on conventional principle decline to hear the constitutional claim. However, the Court concluded by finding that as the "underlying [constitutional] argument is, in my view, weak … it can and should be disposed of now", and went on to reject the argument that s. 19 was unconstitutional.[10]

In *Damache*, the applicant sought *certiorari* of the proposal to revoke notably on the ground that revocation would amount to a disproportionate breach of his rights under article 8 ECHR, and would also breach the principle of proportionality under EU law. The High Court (Humphreys J.) dismissed these arguments, holding that there was a presumption that the ICN Act would be applied in a manner compatible with the State's obligations under ECHR and EU law. The legislature had provided for the s. 19 procedure and that was an adequate and appropriate remedy.[11] On appeal, while the Supreme Court confirmed that judicial review would not normally lie to challenge a proposal to make a decision, for two reasons Dunne J. held that this was an exceptional case warranting an examination of the issues. First, it involved "a systemic attack upon the section, with the result that the principal issue before the Court is the question of the constitutionality of s. 19". Second, "counsel on behalf of the Minister in the course of the hearing before this Court accepted that the question of prematurity of the proceedings was no longer in issue".[12] Of note here is a similar approach taken by Simons J. in another 2020 judgment: *Náisiúnta Leictreach Contraitheoir Éireann v The Labour Court*.[13] In circumstances where both parties in that case were agreed that the constitutional issue should be resolved and where the exercise of judicial self-restraint would merely defer rather than avoid the necessity of a court having to determine the constitutionality of the legislation, the Court examined the constitutional challenge although it had not been necessary to do so.

The applicant in *Damache* made a two-pronged challenge to the constitutionality of s. 19: first, that the revocation of a naturalisation certificate was a judicial rather than executive function; and, second, that the provisions of that section did not afford fair procedures to an individual who faced the severe consequences of the loss of citizenship. The first argument was rejected by the Supreme Court while the second argument was successful, leading to a declaration of unconstitutionality. The fair procedures arguments in *Habte* had been rejected as being premature. What seems to have made the pre-emptive constitutional challenge appropriate in *Damache* was the fact that the procedural shortfall (the non-binding nature of the committee's report) was an express term of the legislation, which could not have been remedied throughout the course of the inquiry.

The Supreme Court held that given the serious effects flowing from the loss of citizenship, high standards of natural justice were called for, to the level of requiring an impartial and independent decision-maker. While the Court was satisfied that the committee of inquiry was an independent body, its findings were not binding on the Minister. This was the basis on which the Supreme Court found the section to be unconstitutional.

The dividing line between executive and judicial functions

Both in *Habte* and *Damache*, the argument that s. 19 was unconstitutional because it permitted the executive to exercise a judicial function was rejected. The reasoning of the Supreme Court in *Damache* on this argument was similar to that in *Habte*. At para 39, Dunne J. referred to the test set out in *McDonald v Bord na gCon No. 2*[14] to be applied in determining whether a function was a judicial function reserved for the courts under article 34.1 of the Constitution:

"It seems to me that the administration of justice has these characteristic features:

1. A dispute or controversy as to the existence of legal rights or a violation of the law;
2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
4. The enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State, which is called in by the court to enforce its judgment;
5. The making of an order by the court, which as a matter of history is an order characteristic of courts in this country".

In applying this test, Dunne J. held that the fifth criterion was not satisfied: "from an historical point of view, it has long been the function of the executive to decide on issues of naturalisation and it has never been the role of the courts to make such decisions". While at issue was a decision to revoke rather than to grant a naturalisation certificate, "as a matter of logic [the court could not] see how that decision of itself is something outside the function of the executive".[15]

The Supreme Court was also satisfied that the fourth criterion in *McDonald* was not met as while the revocation of a naturalisation certificate had "a number of legal effects … deportation of such an individual would involve the invocation of an entirely separate statutory procedure and the making of an entirely separate decision and order … It is simply not something that is enforceable by court order without further and different procedures being followed and orders being made".[16]

The Supreme Court was asked to rule on whether this power was administrative, executive or judicial. If administrative, a ruling on whether the function was "limited" within the meaning of Article 37 of the Constitution would have been requireat the administration of justice but was the exercise of an executive function.[17] Thus, the Court appears to hold that a decision to revoke a person's nationality falls within the discretionary decision-making authority of the executive.

A number of difficulties arise from these findings when considered alongside the findings in respect of the second (fair procedures) prong of the constitutional challenge in *Damache*. First, if the revocation of citizenship falls within the discretionary decision-making authority of the executive (as opposed to being an administrative function), this principle does not sit well with the finding that such a decision must be made by an impartial and independent decision maker. Other functions deemed to be executive functions include the issue of deportation orders, granting permission to reside under s. 3 of the Immigration Act 1999, and granting permission to reside under ad hoc administrative schemes. These decisions can be characterised as decisions on which the Minister for Justice herself (or those acting on her behalf) has the final discretionary call.

Second, in considering the fair procedures prong of the constitutional challenge, the Supreme Court contrasted the position of Mr Damache with a person claiming international protection pursuant to the International Protection Act 2015. The latter had a right of appeal to the independent International Protection Appeals Tribunal (IPAT), but the former did not have the same level of procedural safeguards. The difficulty with this analogy is that a person who satisfies the criteria for international protection is entitled to that status as of right, unless excluded under ss. 12 or 47(3) of the 2015 Act. The Minister has no discretion where such criteria are satisfied[18] and arguably acts as an executive means of enforcement. This can be contrasted with the broad discretion associated with the executive functions mentioned above. The functions of the IPAT seem to satisfy the criteria for a judicial function under the *McDonald* test and such a tribunal is arguably a body envisaged by Article 37 of the Constitution as being constitutionally permitted to have a limited judicial function. This analogy seems to weaken the finding of the Court that the revocation of a naturalisation certificate is an executive function.

Third, while it has traditionally been the function of the executive to grant naturalisation certificates, the revocation of such certificates is a more recent phenomenon. The latter function has only been exercised in this State since 2018[19] and the comparative position in other jurisdictions was found by the Supreme Court to be scanty.[20] If this function has not traditionally been exercised by any organ of the State, it seems difficult to apply the fifth criterion of the *McDonald* test at all.[21] The Supreme Court nevertheless held that as a matter of logic it could not see how the decision to revoke of itself was

something outside the function of the executive.[22] This seems to couple the decision to grant to the decision to revoke, such that if one is a traditional function of the executive, so is the other. However, there are seeds in considerations throughout the judgment that suggest that this should not necessarily be the case. The Supreme Court referred to observations made by O'Donnell J. in *P. v Minister for Justice*[23] where he highlighted the different points of departure as between a non-citizen seeking the benefit of citizenship and a citizen possessing the entire range of constitutional rights:[24]

> *Thus, the Court appears to hold that a decision to revoke a person's nationality falls within the discretionary decision-making authority of the executive.*

"The origin of the procedure [to grant naturalisation], and the extremely broad discretion conferred upon the Minister, lies in some fundamental conceptions of sovereignty … A decision in relation to the conferral of citizenship … confers the entire range of constitutional rights upon such a person … [These procedures] apply only to non-citizens seeking naturalisation".

The Supreme Court also referred to the judgment of the Court of Justice of the European Union (CJEU) in *Rottmann* C-135/08. In that case, the CJEU confirmed that according to established caselaw, it was for each member state to lay down the conditions for the acquisition and loss of nationality. However, once Union citizenship was granted to an individual, that individual then possessed all rights attaching to that status. In this way, the revocation of Union citizenship became a matter upon which the Court could rule:

"46. In those circumstances, it is for the Court to rule on the questions referred by the national court which concern the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status".

Both O'Donnell J.'s observations in *P. v Minister for Justice* and the findings of the CJEU in *Rottmann* suggest that a principled distinction may be drawn between the process of granting the benefit of citizenship to a non-national and that of taking from a citizen all the rights attached to that status. Traditionally, the courts have had a role in safeguarding citizens' rights.

Finally, in respect of the fourth criterion in *McDonald*, the Supreme Court concluded that the revocation of a naturalisation certificate was not something that was enforceable by court order without further and different procedures being followed and orders being made, namely the deportation procedure.

Yet, the deportation of that individual would not necessarily follow. Although they no longer hold Irish citizenship, such an individual could apply for and be granted a form of residence permission. Deportation is not the enforcement of a revocation decision, but is, as the Court observed, an entirely separate statutory procedure.

The Supreme Court also observed that it was quite clear that the revocation of a certificate of naturalisation has a number of legal effects. These included the loss of rights guaranteed under the Constitution to citizens, the loss of EU citizenship and the loss of the right to an Irish passport. If Mr Damache had applied for an Irish passport following revocation, the Minister for Justice (or the passport office) could simply rely on the revocation decision to refuse him an Irish passport. It could be enforced by the executive in this way.

Though difficulties seem to arise in reconciling the contrasting findings of the Supreme Court in relation to the two prongs of the constitutional challenge, the result of a finding in favour of Mr Damache on either prong would have been the same: a declaration that s. 19 of the INC Act is unconstitutional and the end of the colourful, short waking life of this section.

*With thanks to Sara Moorhead SC and John Stanley BL for their helpful comments on earlier drafts of this article.

References

1. [2020] IECA 22 (judgments of the Court of Appeal of February 5, 2020).
2. [2020] IESC 63 (judgment of the Supreme Court of October 14, 2020).
3. Its membership comprised retired judge Patrick McMahon (who served as its chairman), former cabinet minister Olivia Mitchell and solicitor Philip O'Leary.
4. Para. 70 of Murray J.'s judgment.
5. See para. 10 of Dunne J.'s judgment.
6. Paras. 96-97 of Murray J.'s judgment.
7. Para. 98 of Murray J.'s judgment.
8. Para. 121 of Murray J.'s judgment.
9. Para. 124 of Murray J.'s judgment.
10. Paras. 125-128 of Murray J.'s judgment.
11. Paras. 16-19 of Dunne J.'s judgment.
12. Para. 31 of Dunne J.'s judgment.
13. [2020] IEHC 303 (judgment of the High Court of June 23, 2020).
14. [1965] IR 217.
15. Para. 67 of Dunne J.'s judgment.
16. Para. 70 of Dunne J.'s judgment.
17. Para. 73 of Dunne J.'s judgment.
18. See *PNS (Cameroon) v Minister for Justice* [2020] IESC 11, para. 74.
19. Though some older cases concern other means of revoking citizenship acquired otherwise than by naturalisation, e.g., *Kelly v Ireland* [1996] 3 I.R. 537 and *N.A. Somalia* [2017] IEHC 741.
20. Para. 69 of Dunne J.'s judgment.
21. See similar observations made by Simons J. in *Zalewski v WRC* [2020] IEHC 178 at para. 113.
22. Para. 67 of Dunne J.'s judgment.
23. [2019] IESC 47.
24. Paras. 26 and 93 of Dunne J's judgment.

Making the system work

Almost a year into her role as Chief Executive of the Personal Injuries Assessment Board, Rosalind Carroll spoke to *The Bar Review* about the Board's role, and impending reforms in the sector.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Rosalind Carroll had been in her new role as Chief Executive of the Personal Injuries Assessment Board (PIAB) for just two weeks last March when the country went into lockdown. Rather than having time to get to know staff and stakeholders, she found herself in crisis management mode, as all but a small number of staff moved immediately to remote working. That small team remains in the office, operating under strict public health guidelines, in order to fulfil the PIAB's statutory functions, and Rosalind is proud of the speed with which staff adapted, with services up and running again within a couple of weeks. There have been significant challenges, such as trying to move from a predominantly paper-based service to electronic communication, or having to cancel 7,000 medical assessments at short notice, but all of this was achieved without creating significant delays for claimants: "In 2019 our timeline for assessment was about 7.8 months – that's the average time from when the respondent [insurer] consents to the PIAB assessing the claim to an assessed award being made. Last year it went to 8.91 months".

One of the biggest challenges for Rosalind has been missing out on face-to-face engagement with a stakeholder group that includes the public, Government, the legal profession and insurers: "[Online meetings] are very task oriented. It's much harder to build up that camaraderie, whether that's with stakeholders, or your own staff".

She is also aware that the organisation must try to prepare itself for the "unknowns" of the coming months: "Obviously, fewer cars on the road and people in offices, fewer people in bars and restaurants, all equals fewer accidents. Understanding what's happening with those numbers is something that we have to start thinking about from a strategic perspective".

Building trust

The PIAB is the independent State body that assesses personal injury compensation, and Rosalind sees this remit in its broadest sense: "Our most important function is assessing claims and ensuring that we have that independent, fair assessment of the claim that's a good outcome for both parties. That should have a more broad contribution to insurance in Ireland and its functioning. Every time we make an assessment and that award is accepted, we hope that we start contributing more to that. We want to make sure that people make informed decisions, that they understand what our role in the process has been, and that they then begin to trust the PIAB and trust the system".

Rosalind sees a number of parallels between this role and her previous job as Director of the Residential Tenancies Board (RTB): "In the RTB one of our main purposes was delivering a dispute resolution service to move away from litigation, and to provide a fair, independent service that was quicker and cheaper than a litigation alternative, so the principle is very much the same". There are parallels in terms of the wider issues too: "Housing is one of those really topical, critical areas that affects everybody. Insurance is the same.

House and home

Rosalind Carroll's career began at Dublin City Council, before a move to the Department of Environment, Community and Local Government in 2007. She then joined the Housing Agency Ireland as Head of Housing Services in 2011, eventually becoming Head of Regulation there in 2014. She joined the Residential Tenancies Board, an independent public body established to regulate the rental sector, in 2016 as Director, a role she held until her move to the PIAB in March 2020.

Rosalind lives in Dublin with her husband and daughter. Like many other people, she is busy balancing work and home schooling at the moment, but likes to walk every day, and has recently taken up sea swimming, making a weekly trip to the water:

"That Saturday swim really just takes everything out of your mind. Between that and the walk, those two are the things that really clear my head".

People think of insurance as financial services, but it is something that each and every one of us needs. It also impacts on all of us from an economic and societal perspective when businesses can't make sufficient money to cover high insurance costs, or can't survive because of insurance issues. In the very broadest sense, insurance matters, and for that very reason reform needs to take place".

"Obviously, fewer cars on the road and people in offices, fewer people in bars and restaurants, all equals fewer accidents. Understanding what's happening with those numbers is something that we have to start thinking about from a strategic perspective".

Action plan

The Government published its Action Plan for Insurance Reform in December 2020, and one of its principal actions is to "enhance and reform the role of the Personal Injuries Assessment Board". Rosalind and her team are working closely with Minister Robert Troy at the Department of Enterprise, Trade and Employment on this process, which she says in the first instance is about reviewing and auditing the Board's work to see if it is fulfilling its purpose in the most effective and efficient way possible: "We were set up to remove costly litigation. Are we doing that and are we doing enough of that? I think the answer to that is probably not".

When an individual brings a case to the PIAB, the respondent (usually an insurance company) must consent to an assessment. Once consent is given, the assessment is made, and the PIAB makes a recommendation as to an award. If both parties accept the award, the case is resolved, but if one party does not, they may then pursue litigation. For Rosalind, any analysis of the Board's success starts with the figures around those consents and acceptances: "The number of respondents consenting to an assessment last year was 54%. That leaves a significant proportion who are moving forward to litigation before we've even started. Where there has been consent, just over 50% of awards were accepted".

Data from the Central Bank's National Claims Information Database (NCID) further shows that only 2% of those cases go to court, implying that the vast majority are settled. For Rosalind, the significance of this is in the analysis of the cost, both monetary and in terms of time: "Although they left us, potentially at either consent or award stage, the average award value for claims under €100,000 in 2019 from the PIAB was €22,000, and in the litigated cases it was €23,000. The average time it took under the PIAB process, from the date of accident, was 2.9 years, whereas the average time it took in litigation was 4.7 years".

There is also a stark difference in legal costs: "Under the PIAB model the legal costs were 4% of the award value, whereas in cases that went to litigation they were 67%, adding, on average, nearly €16,000 to the cost of the claim".

These figures drive up insurance costs, as well as adding to stress for claimants. In essence then, part of the reform process, in Rosalind's view, should be looking at ways to retain more cases within the PIAB system. The final decisions will rest with the Minister and the subcommittee being established to deal with the reform process, but Rosalind believes the following will be key: "We're going to be looking at the data, whether it's the Central Bank's or our own, to see how we can keep some more of those cases where we can, and where it's appropriate to do so".

Greater use of non-adversarial methods such as mediation is another possibility that she would like to explore.

There will be a public consultation, and Rosalind would like to see this operate efficiently, with a focus on solutions, and for the process to avoid going back over ground already covered by the Personal Injuries Commission and the Cost of Insurance Working Group: "What we can be really clear on now is all the problems – we need to be open to solutions. It's important to make sure it's functional, and leads us to some quick decision making. The action plan says that proposals would be made by June. Then we should be clear about what legislative or other changes need to be made".

Transparency

From her own perspective, there are some reforms that Rosalind would like to see, such as the publication and implementation of the Judicial Council's personal injuries guidelines, which she says the PIAB very much welcomes: "Hopefully they're going to have a really good impact in terms of, not just award levels, but trust in the system".

One of the more significant reforms is the fact that the Book of Quantum will no longer be the responsibility of the PIAB. Rosalind feels that this, too, will improve transparency and trust: "Even though the Book of Quantum was there and available for everybody, I think the fact that the guidelines are being produced by the Judicial Council will give them more weight. There's also been a lot of media and publicity around it, so hopefully that will improve public

understanding, that that is what you can expect for this type of injury. The result hopefully should be more acceptance of our awards, because people know that the courts are going to be giving the same. One of the stipulations in the Act regarding the guidelines is that if a judge wishes to depart from them in terms of an award, then they must provide a justification for that. That's stronger than it would have been before, and I think that will be really important".

"Hopefully they're going to have a really good impact in terms of, not just award levels, but trust in the system".

Data

The Board's own strategic plan sets out the publication and dissemination of its data as a key objective. Rosalind believes this could be a game changer in terms of public understanding, and also in terms of policy change and insurance reform: "The PIAB had a conference in 2019 where they started using some of their data and it was really well received. We want to build on that, so that we're coming out with a periodic report, maybe three reports a year, based on our data – on the when, the where, the type of accident and type of injuries".

She gives the perennial topic of whiplash as an example: "How many car accidents involve whiplash? Are they minor, moderate? What type of awards do you get for that?"

Apart from using aggregated data, she would also like to introduce case studies, again as a way of making information accessible to stakeholders and the public: "What does a case mean to the person? What does it mean for business? What does it mean to the insurance industry, the solicitors, barristers? I think it's important that you join those things together".

Once again it's all about transparency: "With the Personal Injuries Commission, the Cost of Insurance Working Group and all of the various stakeholders, the issue of transparency comes up over and over again. The more data we can give not only gives trust to what the PIAB is doing from an award perspective and an assessment perspective, but it feeds into things like competition within the insurance industry. And then hopefully it also feeds into policymaking, good decision-making. The more data we provide, the more we're taking the expertise that we're building and utilising it for a broader outcome".

'Compo' culture

Media coverage of personal injuries cases in the past has often focused on more high-profile cases, or fraudulent cases, perhaps adding to the perception of an adversarial relationship between the public and insurers, where members of the public will try to get whatever they can from a claim – the controversial concept of 'compo' culture. For Rosalind, such attitudes are inaccurate and unhelpful: "We as a society can do a lot of victim blaming and we often also do a lot of blaming of insurance companies. The PIAB is not in the business of doing either of those things. I think it's recognised that our award levels are very high comparative to other jurisdictions, but we can't blame an individual for the fact that that's where we set our award levels. If the PIAB or a judge is giving an award at that level, it's not the victim's fault".

She points again to the costs of these actions, both in monetary terms, and in terms of the time and stress for those involved: "We need to recognise that it's the system, not just the award amounts that's at issue: where we have so many people still ending up on a litigation pathway, that is costing 67% more, and the time that it takes will cost businesses huge amounts of money in between".

She hopes that the coming reforms will address some of the issues around fraudulent claims: "I think fraud is in the minority rather than the majority. That doesn't mean we shouldn't do more about fraud, that it's not really serious. But we can't pretend that the whole system is fraudulent. I'd like us to look at the systemic issues and that means more joined-up thinking and more joined data across Government. One of the things that we would suggest is that we have more powers to share data under our legislation; that would be one of the smaller reform measures, but quite impactful in terms of that kind of issue".

Education and communication

So how does the PIAB get these important messages to the public? In her previous role with the RTB, Rosalind faced a similar challenge, of getting past public perceptions of the relationship between landlord and tenant to inform both parties of their rights, and their responsibilities. With the PIAB, the approach is similar, and involves informing the public of what the Board does, and encouraging them to contact the Board with their queries while they are deciding what path to take with a claim: "Last year we started trying to advertise more so that people started to understand what we do, and what their choices are.

For years the PIAB was maybe a little restrained in going out publicly because there's a balance to be had between appearing to promote claims and ensuring that people can make informed decisions. We can't provide advice on a specific case but that doesn't mean that we can't tell people how the system works. We need to make sure that we're approachable as an organisation. What you want is that when someone says the PIAB's name, people have a general understanding of what we do and we probably don't have that as much as we should".

Rosalind says that interaction with stakeholders has been very positive: "We've had good contact with Government, and with the legal profession. Particularly during the pandemic we've really concentrated on trying to communicate with our stakeholders, making sure that people aren't an afterthought. Reaching out to all of the stakeholders is absolutely a priority for us, but as we get back to normal, getting back in a room with people is something I'm really looking forward to".

Talking to insurers is a crucial part of this, particularly given that one of the PIAB's aims is to reduce costly and lengthy litigation as this impacts on insurance premiums. Rosalind wants insurers to be involved at all stages of the reform process: "The insurers are one of our main stakeholders and we make sure we talk to them at that strategic level. We'll be going back to insurers, and to Insurance Ireland, asking them: is there a reason why consents are up or down? We're constantly engaging to try and understand trends within the sector, why they might reject an award. If we can start to understand that, then we can start to improve our service. Everything has to be about improving what we do".

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

Volume 26 Number 1
February 2021

A directory of legislation, articles and acquisitions received in the Law Library from the November 13, 2020, to January 14, 2021. Judgment information supplied by Justis Publishing Ltd.
Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.

AGRICULTURE

Statutory instruments

Appointment of special advisers (Minister for Agriculture, Food and the Marine) order 2020 – SI 731/2020

Appointment of special advisers (Minister of State at the Department of Agriculture, Food and the Marine) order 2020 – SI 732/2020

Appointment of special adviser (Minister of State at the Department of Agriculture, Food and the Marine) order 2020 – SI 733/2020

ANIMALS

Professional misconduct – Suspension – Registration – Applicant seeking an order confirming its decision to cancel the respondent's registration for a period of two months – Whether the leniency shown was unreasonable – [2020] IEHC 655 – 14/12/2020

The Veterinary Council of Ireland -v- Brennan

Statutory instruments

Animal Health and Welfare Act 2013 (application to specified diseases) order 2020 – SI 516/2020

Avian influenza (biosecurity measures) regulations 2020 – SI 566/2020

Avian influenza (restriction on assembly of live birds) regulations 2020 – SI 567/2020

Veterinary Council of Ireland indemnity insurance regulations 2020 – SI 576/2020

Veterinary Council of Ireland continuing veterinary education for veterinary practitioners regulations 2020 – SI 577/2020

Veterinary Council of Ireland continuing veterinary education for veterinary nurses regulations 2020 – SI 578/2020

Horse and greyhound racing fund regulations 2020 – SI 596/2020

Avian influenza (precautionary confinement of birds) regulations 2020 – SI 663/2020

ARBITRATION

Adjudication – Stay – Balance of justice – Notice party seeking an order lifting the stay on the adjudication – [2020] IEHC 623 – 02/12/2020

O'Donovan v Bunni

Library acquisitions

Keogh, D., Lawless, N. *Adjudication Practice and Procedure: Construction Contracts Act 2013*. London: Routledge, 2020 – N398.6.C5

Scherer, M., Bassiri, N., Abdel Wahab, M.S. *International Arbitration and the COVID-19 Revolution*. Netherlands: Kluwer Law International, 2020 – N398.8

Articles

Hughes, P. The mis(use) of without prejudice correspondence in construction adjudication. *Irish Law Times* 2020; (38) (19): 292

BANKING

Summary judgment – Defence – Plenary hearing – Appellants appealing from summary judgment – Whether the appellants had demonstrated any credible or *bona fide* defence – [2020] IECA 318 – 19/11/2020

Allied Irish Bank v O'Callaghan

Slip rule – Admission of affidavits – Statutory interpretation – Appellant appealing from the rejection of an application pursuant to O. 28, r. 11 of the Rules of the Superior Courts – Whether a literal interpretation ought to be applied to the rules – [2020] IECA 313 – 17/11/2020

Beakey v Bank of Ireland Mortgage Bank

Limitation – Statute barred – Strike out – Appellant seeking to strike out or dismiss the respondents' claim – Whether the trial judge was wrong to hold that the claim was not statute barred – [2020] IECA 305 – 11/11/2020

Byrne v National Asset Management Agency

Misrepresentation – Negligent statements – Statute barred – Appellants seeking to appeal from Court of Appeal decision – Whether the High Court erred in finding that the appellants were not statute barred in their claims of misrepresentation and negligent statements – [2020] IESC 71 – 10/12/2020

Cantrell v Allied Irish Banks Plc

Summary judgment – Inordinate and inexcusable delay – Want of prosecution – Defendant seeking an order striking out the proceedings brought against her by the plaintiff – Whether there was inordinate and inexcusable delay on the part of the plaintiff in progressing the action – [2020] IEHC 646 – 11/12/2020

The Governor and Company of Bank of Ireland v Wilson

Articles

Murphy, T. Proving the record: admissibility of business documents in civil proceedings – a modern solution to an old problem. *Commercial Law Practitioner* 2020; (27) (9): 196

BANKRUPTCY

Bankruptcy – Petition – Adjudication – Appellant seeking to show cause against the validity of his adjudication in bankruptcy – Whether the bankruptcy petition was invalid – [2020] IECA 182 – 07/07/2020

Minister for Communications, Energy and Natural Resources v Wymes (a bankrupt)

Bankruptcy – Adjournment – Alternatives – Applicant seeking to have the respondents adjudicated bankrupt – Whether the court was required to consider what alternatives to bankruptcy were available – *[2020] IEHC 544 – 06/11/2020*

O'Brien v Farrell

Statutory instruments

Personal Insolvency Act 2012 (prescribed fees) (amendment) regulations 2020 – SI 678/2020

BROADCASTING

Statutory instruments

Broadcasting Act 2009 (section 33) levy (amendment) order 2020 – SI 521/2020

CHILDREN

Statutory instruments

Child care (placement of children in foster care) (emergency measures in the public interest – Covid19) (amendment) (no. 2) regulations 2020 – SI 540/2020

Child care (placement of children with relatives) (emergency measures in the public interest – Covid 19) (amendment) (no. 2) regulations 2020 – SI 541/2020

Appointment of special advisers (Minister for Children, Equality, Disability, Integration and Youth) order 2020 – SI 549/2020

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 29) (meetings of the Oberstown Children Detention Campus board of management) (designation) order 2020 – SI 553/2020

Children, equality, disability, integration and youth (delegation of ministerial functions) order 2020 – SI 739/2020

CIVIL LAW

Articles

Kennedy, L., King, S., Digney, E. Covid-19 triggers welcome civil litigation reforms. *Law Society Gazette* 2020; (Nov): 54

Statutory instruments

Civil Registration (Amendment) Act 2014 (commencement) order 2020 – SI 550/2020

Civil registration (births, deaths, marriages and civil partnerships) (fees) regulations 2020 – SI 552/2020

COMMERCIAL LAW

Library acquisitions

Bridge, M., Bennett, H., Benjamin, J.P. *Benjamin's Sale of Goods (11th ed.)*. London: Sweet & Maxwell, 2020 – N280

Forde, M. *Commercial Law (4th ed.)*. Dublin: Bloomsbury Professional, 2020 – N250.C5

Articles

Geoghegan, D. The parole evidence rule and collateral contracts: circularity and incoherence. *Commercial Law Practitioner* 2020; (27) (9): 187

Grant, C. Are you ready to migrate? The migration of participating Securities Act 2019. *Commercial Law Practitioner* 2020; (27) (11): 231

McEneaney, C. Is it time to expressly deal with good faith? Review of recent developments in Irish and English jurisprudence. *Commercial Law Practitioner* 2020; (27) (10): 217

Statutory instruments

Business, Enterprise and Innovation (alteration of name of department and title of minister) order 2020 – SI 519/2020

Credit Guarantee (Amendment) Act 2020 (extension of guarantee date) order 2020 – SI 633/2020

Industrial and Provident Societies Act 1893 (section 14A(1)) (Covid-19) order 2020 – SI 671/2020

COMPANY LAW

Oppression proceedings – Stay – Plenary proceedings – Respondents seeking to stay oppression proceedings until the determination of plenary proceedings – Whether the applicant could maintain the oppression proceedings without having his name on the respondent's register of members – [2020] IEHC 630 – 30/11/2020
Devlin v O'Driscoll
Declaratory relief – Strike out – Stay – Respondent seeking an order striking out and/or staying the proceedings against him – Whether the applicant's failure to provide documentation had prejudiced the respondent's ability to defend himself – [2020] IEHC 565 – 06/11/2020
Whelan Limestone Quarries Ltd v Companies Act 1963 to 2009

Statutory instruments

Companies Act 1990 (uncertificated securities) (amendment) regulations 2020 – SI 609/2020
Companies Act 2014 (fees) regulations 2020 – SI 626/2020
Companies Act 2014 (forms) regulations 2020 – SI 627/2020
Companies Act 2014 (form and content of documents delivered to registrar) regulations 2020 – SI 628/2020
Companies Act 2014 (section 897) order 2020 – SI 629/2020
Companies Act 2014 (Statutory Audits) Act 2018 (commencement) order 2020 – SI 630/2020
Companies (Amendment) Act 2019 (commencement) order 2020 – SI 631/2020
Companies Act 2014 (section 12A(1)) (Covid-19) order 2020 – SI 672/2020

COMPETITION LAW

Articles

Murphy, W., Friel, R. Free or fair: a new paradigm for competition policy? *Commercial Law Practitioner* 2020; (27) (10): 207

COSTS

Costs – Libel – Lay litigant – Appellant seeking costs – Whether the appellant was entitled to his costs in the appeal – [2020] IECA 315 – 18/11/2020
Corrigan v Kevin P Kilrane & Company Solicitors
Costs – Order of mandamus – Commissions of Investigation – Parties seeking costs – Whether costs should follow the event – [2020] IECA 310 – 16/11/2020
Fox v The Minister for Justice and Law Reform
Costs – Isaac Wunder order – Stay – Parties seeking costs – Whether costs should follow the event – [2020] IECA 316 – 18/11/2020
Houston v Doyle
Costs – Planning and development – Stay – Appellants seeking costs – Whether the interests of justice entitled the appellants to their costs – [2020] IESC 68 – 23/11/2020
Krikke v Barranafaddock Sustainability Electricity Ltd
Costs – Judicial review – Leave – Parties seeking costs – Whether costs follow the event – [2020] IEHEC 568 – 11/11/2020
O'Connell v The Taxing Master
Costs – Leave application – Judicial review – Appellant seeking costs of leave application – Whether the trial judge erred and misdirected himself in law by concluding that no particular injustice had been shown to the appellant – [2020] IECA 343 – 07/12/2020
S.P. v Minister for Justice and Equality
Costs – Stay – Entitlement – Defendant seeking costs – Whether costs should follow the event – [2020] IEHC 681 – 18/12/2020
Vodafone Ireland Ltd v Rigney Dolphin Ltd
Costs – Access/custody – Conduct – Respondent seeking costs – Whether the appellant should pay the costs of the access/custody application – [2020] IEHC 579 – 17/11/2020
X v Y

Library acquisitions

Rowley, J., Middleton, S. *Cook on Costs 2021: A guide to legal remuneration in civil contentious and non-contentious business*. London: Butterworths, 2020 – L89

COURTS

Statutory instruments

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 30(3)) order 2020 – SI 530/2020
Rules of the superior courts (probate and administration oaths and bonds) 2020 – SI 590/2020
Courts (Supplemental Provisions) Act 1961 (judicial remuneration) (section 46(9)) (no. 2) order 2020 – SI 610/2020
Courts (Supplemental Provisions) Act 1961 (judicial remuneration) (section 46(9)) order 2020 – SI 611/2020
District court districts and areas (amendment) and variation of days (Ardee and Drogheda) order 2020 – SI 643/2020

CRIMINAL LAW

Question of law – Exclusion of evidence – Assault causing serious harm – Applicant referring question of law to Court of Appeal – Whether the trial judge was correct to exclude evidence tendered by way of a certificate pursuant to s. 25 of the Non-Fatal Offences Against the Person Act 1997 on the grounds that the medical practitioner who prepared the certificate had not personally performed the examination referred to in the certificate – [2020] IECA 362 – 21/12/2020
DPP v A.C.
Conviction – Drug offences – Corroboration warning – Appellant seeking to appeal against conviction – Whether the trial judge erred in law and in fact in failing to give a corroboration warning to the jury – [2020] IECA 333 – 30/11/2020
DPP v Conroy
Prohibition – Publication – Sexual offences – Applicant appealing against the High Court order prohibiting naming the respondent – Whether the order was superfluous – [2020] IECA 321 – 23/11/2020
DPP v H.
Conviction – Murder – Provocation – Appellants seeking to appeal against conviction – Whether the trial was unsatisfactory – [2020] IECA 300 – *09/11/2020*
DPP v Hayes and Hogan
Conviction – Rape – Perverse verdict – Appellant seeking to appeal against conviction – Whether the verdict of the jury was contrary to the weight of the evidence and was perverse – [2020] IECA 367 – 22/12/2020
DPP v M.A.
Sentencing – Drug offences – Enlargement of time – Applicant seeking enlargement of time in which to appeal against severity of sentence – Whether the interests of justice would be served in allowing the enlargement of time – [2020] IECA 349 – 17/09/2020
DPP v Power
Sentencing – Sexual offences – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2020] IECA 311 – 16/11/2020
DPP v S.A.
Sentencing – Causing serious harm – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2020] IECA 299 – 06/11/2020
DPP v Schaufler
Conviction – Threatening to kill or cause serious harm – Unsafe verdicts – Appellant seeking to appeal against conviction – Whether the trial was unsatisfactory and the verdicts were unsafe – [2020] IECA 358 – 18/12/2020
DPP v Walsh
Sentencing – Dangerous driving causing serious harm – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2020] IECA 350 – 14/10/2020
DPP v Whelan
Contempt of court – Committal – Trespass – Plaintiff seeking the attachment and committal of the respondents – Whether contempt of court was manifestly clear – [2020] IEHC 624 – 02/12/2020
KBC Bank Ireland Plc v McGann

Library acquisitions

Brown, G. *Sentencing Rape*. United Kingdom: Hart Publishing, 2020 – M587

Articles

Donnellan, L., Dr. Consent and the Common Law Exceptions: *R. v Brown* still good law. *Irish Criminal Law Journal* 2020; (30) (3): 62

Statutory instruments

Appointment of special advisers (Minister for Justice and Equality) order 2020 – SI 679/2020
Criminal Justice (Mutual Assistance) Act 2008 (designation of United Kingdom) order 2020 – SI 718/2020
Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (section 110) designation of United Kingdom) order 2020 – SI 722/2020

DAMAGES

Personal injuries – Damages – Liability – Plaintiff seeking damages – Whether the defendants were liable – [2020] IEHC 660 – 15/12/2020
Farrell v Minister for Agriculture, Food and the Marine
Personal injury – Damages – Negligence – Plaintiff seeking damages – Whether the defendant was guilty of negligence [2020] IEHC 572 – 02/06/2020
Harford v Electricity Supply Board
Personal injuries – Insurance – Liability – Plaintiff seeking damages – Whether the second defendant was justified in refusing to indemnify the first defendant – [2020] IEHC 658 – 10/12/2020
Moloney v Cashel Taverns Ltd (in voluntary liquidation)
Damages – Right to trial with reasonable expedition – Miscarriage of justice – Appellant seeking damages in respect of an alleged breach of the right to trial with reasonable expedition – Whether there was unreasonable delay in progressing the appellant's case – [2020] IECA 180 – 06/07/2020
O'Callaghan v Ireland
Personal injuries – Damages – Future loss of earnings – Defendants appealing the awarding of €250,000 in damages for future loss of earnings to the plaintiff – Whether the trial judge offered no explanation or breakdown of what her headline figure was or what deduction she applied – [2020] IECA 200 – 24/07/2020
O'Doherty v Callinan
Damages – Road traffic collision – Negligence – Plaintiff seeking damages – Whether the plaintiff had established on the balance of probabilities that the alleged road traffic collision occurred as a result of negligent driving by the first defendant – [2020] IEHC 641 – 19/11/2020
Olaru v The Motor Insurers' Bureau of Ireland

Articles

Flynn, G. There are some things that money cannot buy. *Conveyancing and Property Law Journal* 2020; (25) (4): 78

DATA PROTECTION

Library acquisitions

Caldarola, M.C., Schrey, J. *Big Data and Law*. United Kingdom: Hart Publishing, 2020 – M209.D5.E95
Coppel, P. *Information Rights: Law and Practice (5th ed.)*. Oxford: Hart Publishing, 2020 – M209.I6
Jay, R. *Data Protection Law and Practice (5th ed.)*. London: Sweet & Maxwell, 2020 – M209.D5

Articles

Barrett, M. Share and share alike. *Law Society Gazette* 2020; (Nov) 38:
Murphy, T. The justiciability of data protection laws in Ireland: a new dawn of

civil litigation? *Commercial Law Practitioner* 2020; (27) (11): 238

Statutory instruments

Data Protection Act 2018 (section 60(6)) (Central Bank of Ireland) regulations 2020 – SI 534/2020

DEFAMATION

Extension of time – Limitation period – Defamation – Defendants appealing against an order granting the plaintiff an extension of time under s. 11(2)(c) of the Statute of Limitations 1957 – Whether an application for an extension of time under s. 11(2)(c) of the Statute of Limitations 1957 can be made retrospectively outside the permitted extension period in respect of proceedings that have already been issued within the period – [2020] IEHC 687 – 15/12/2020

McKenna v Kerry County Council

Library acquisitions

Rogers, H. Rampton, R., Atkinson, T., Eardley, A. *Duncan and Neill on Defamation and Other Media and Communications Claims (5th ed.)*. London: LexisNexis, 2020 – N38.2

DISABILITY

Statutory instruments

Disabled drivers and disabled passengers fuel grant (amendment) regulations 2020 – SI 748/2020

Disabled drivers and disabled passengers (tax concessions) (amendment) regulations 2020 – SI 749/2020

DISCOVERY

Discovery – Damages – Personal injuries – Appellant seeking discovery – Whether the appellant identified the exact basis on which it was proper for the court to exercise its discretion to direct the making of discovery – [2020] IECA 282 – 19/10/2020

Micks-Wallace (a minor) v Dunne

Discovery – Damages – Negligence – Defendant seeking further and better discovery against the plaintiff – Whether documents either referred to, or attached with, the discovered documents must themselves be discovered – [2020] IEHC 636 – 30/11/2020

Minister for Education and Skills v Western Building Systems Ltd

Personal injuries – Discovery – Objection – Teaching Council of Ireland seeking discovery – Whether the absence of any objection tilted the balance in favour of ordering disclosure – [2020] IEHC 683 – 21/12/2020

Teaching Council of Ireland, In re

Discovery – Relevance – Confidentiality – Plaintiff seeking discovery – Whether the documentation was relevant – [2020] IEHC 574 –13/11/2020

The White Country Inn (a firm) v Crowley (2)

Discovery – Relevance – Burden – Plaintiff seeking discovery – Whether the documentation was relevant – [2020] IEHC 575 – 13/11/2020

The White Country Inn (a firm) v Crowley (1)

EDUCATION

Statutory instruments

Appointment of special advisers (Minister for Further and Higher Education, Research, Innovation and Science) order 2020 – SI 542/2020

Technological Universities Act 2018 (section 36) (appointed day) order 2020 – SI 568/2020

Student grant (amendment) scheme 2020 – SI 570/2020

Research policy and programmes (transfer of departmental administration and ministerial functions) order 2020 – SI 586/2020

Science Foundation Ireland (members of board) (transfer of departmental administration and ministerial functions) order 2020 – SI 587/2020

Education welfare (transfer of departmental administration and ministerial functions) order 2020 – SI 588/2020

Student support (amendment) regulations 2020 – SI 600/2020

Appointment of special advisers (Minister for Education) order 2020 – SI 705/2020

Appointment of special adviser (Minister for Education) (no. 2) order 2020 – SI 706/2020

Appointment of special adviser (Minister for Education) order 2020 – SI 707/2020

Appointment of special adviser (Minister of State at the Department of Education) order 2020 – SI 708/2020

Student grant (amendment) scheme 2021 – SI 5/2021

Student support (amendment) regulations 2021 – SI 6/2021

EMPLOYMENT LAW

Summary judgment – Contracts – Maternity Protection Act 1994 s. 22(4) – Appellant appealing against a decision of the Employment Appeals Tribunal whereby it upheld a complaint by the respondents – Whether the Employment Appeals Tribunal made an error of law in finding that s. 22(4) of the Maternity Protection Act 1994 was breached – [2020] IEHC 550 – 02/11/2020

The Boards of Management of Scoil an Chroí ro Naofa íosa v Donnelly

Articles

Barry, R. Breaking new ground: employers' obligations arising from a dismissal due to a refusal to accept revised terms and conditions. *Irish Employment Law Journal* 2020; (17) (4): 103

McGreal, C., Burgess, H. Equality implications of Covid-19 part 3: Mental health and employment and the role of disability discrimination law. *Irish Employment Law Journal* 2020; (17) (4): 92

Statutory instruments

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 31) (appeals officers) (designation) order 2020 – SI 523/2020

Safety, health and welfare at work (biological agents) (amendment) regulations 2020 – SI 539/2020

Redundancy Payments Act 1967 (section 12A(2)) (Covid-19) (no. 4) order 2020 – SI 545/2020

Enterprise, trade and employment (delegation of ministerial functions) order 2020 – SI 579/2020

Enterprise, trade and employment (delegation of ministerial functions) (no. 2) order 2020 – SI 580/2020

Employment regulation (amendment) order (Contract Cleaning Joint Labour Committee) 2020 – SI 608/2020

Appointment of special adviser (Minister of State at the Department of Public Expenditure and Reform) order 2020 – SI 648/2020

Industrial Relations Act 1990 (code of practice for employers and employees on the prevention and resolution of bullying at work) order 2020 – SI 674/2020

Appointment of special advisers (Tánaiste and Minister for Enterprise, Trade and Employment) (no. 2) order 2020 – SI 709/2020

Protection of Employees (Employers' Insolvency) Act 1984 (transfer of personal data) regulations 2020 – SI 730/2020

Appointment of special adviser (Minister of State at the Department of Enterprise, Trade and Employment) order 2020 – SI 744/2020

Appointment of special advisers (Tánaiste and Minister for Enterprise, Trade and Employment) order 2020 – SI 753/2020

ENERGY

Statutory instruments

Electricity Regulation Act 1999 (electricity) levy order 2020 – SI 591/2020

Electricity Regulation Act 1999 (gas) levy order 2020 – SI 592/2020

Electricity Regulation Act 1999 (petroleum safety) levy order 2020 – SI 593/2020

Electricity Regulation Act 1999 (water) levy order 2020 – SI 594/2020

Electricity Regulation Act 1999 (LPG safety licence) levy order 2020 – SI 595/2020

EUROPEAN UNION

Library acquisitions

Bourgeois, J.H.J. *EU Framework for Foreign Direct Investment Control*. The Netherlands: Kluwer law international, 2019 – C227

Council of Bars and Law Societies of Europe. *The European Court of Human Rights: Questions and Answers for Lawyers 2020*. Brussels: CCBE, 2020 – C200

Craig, P., de Burca, G. *EU Law: Text, Cases and Materials (7th ed.)*. Oxford: Oxford University Press, 2020 – W71

Luszcz, V. *European Court Procedure: A Practical Guide (1st ed.)*. Haywards Heath: Hart Publishing, 2020 – W93

ACTS

Withdrawal of the United Kingdom from the European Union (consequential provisions) act 2020 – Act 23/2020 – Signed on December 10, 2020

Statutory instruments

European Union (renewable energy) (amendment) regulations 2020 – SI 524/2020

European Union (interchange fees for card-based payment transactions) (amendment) regulations 2020 – SI 525/2020

European Union (marine equipment) (amendment) regulations 2020 – SI 527/2020

European Union (environmental impact assessment) (National Monuments Act 1930) (section 14D) (amendment) regulations 2020 – SI 528/2020

European Union (good agricultural practice for protection of waters) (amendment) (no.3) regulations 2020 – SI 529/2020

European Union (cableway installations) regulations 2020 – SI 543/2020

European Union (national car test – EU roadworthiness certificates) regulations 2020 – SI 554/2020

European Union (road vehicles: type-approval and market surveillance) regulations 2020 – SI 556/2020

European Communities (pesticide residues) (amendment) regulations 2020 – SI 558/2020

European Union (official controls in relation to food legislation) (imports of food of non-animal origin) regulations 2020 – SI 575/2020

European Union (workers on board seagoing fishing vessels) (organisation of working time) (share fishermen) regulations 2020 – SI 585/2020

European Union (restrictive measures concerning Turkey) (no. 2) regulations 2020 – SI 606/2020

European Union (restrictive measures against cyber-attacks threatening the Union or its member states) (no. 3) regulations 2020 – SI 607/2020

European Union (restrictive measures concerning Burundi) (no. 2) regulations 2020 – SI 615/2020

European Union (restrictive measures concerning Central African Republic) (no. 3) regulations 2020 – SI 616/2020

European Union (restrictive measures against the proliferation and use of chemical weapons) regulations 2020 – SI 617/2020

European Union (restrictive measures concerning the Democratic People's Republic of Korea) (no. 3) regulations 2020 – SI 618/2020

European Union (restrictive measures concerning the Democratic Republic of the Congo) regulations 2020 – SI 619/2020

European Union (restrictive measures concerning Syria) (no. 3) regulations 2020 – SI 620/2020

European Union (restrictive measures concerning Venezuela) (no. 3) regulations 2020 – SI 621/2020

European Union (restrictive measures concerning Iran) (no. 3) regulations 2020 – SI 622/2020

European Union (national general export authorisation) regulations 2020 – SI 623/2020

European Union (UN firearms protocol) regulations 2020 – SI 624/2020
European Union (ecodesign requirements for certain energy-related products) (amendments) regulations 2020 – SI 625/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 1) (commencement) order 2020 – SI 634/2020
European Union (rights of passengers when travelling by bus and coach transport) (amendment) regulations 2020 – SI 635/2020
European Union (rail passengers' rights and obligations) (amendment) regulations 2020 – SI 636/2020
European Union (imports of animals and animal products from third countries) regulations 2020 – SI 656/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 7) (commencement) order 2020 – SI 657/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 6) (commencement) order 2020 – SI 659/2020
European Union (food and feed hygiene) (amendment) regulations 2020 – SI 660/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 22) (commencement) order 2020 – SI 662/2020
European Union (temporary increase of official controls and emergency measures on imports of food and feed of non-animal origin) (amendment) (no. 2) regulations 2020 – SI 664/2020
European Union (retail charges for regulated intra-EU communications) regulations 2020 – SI 668/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 12) (commencement) order 2020 – SI 669/2020
European Union (greenhouse gas emission reductions, calculation methods and reporting requirements) (amendment) regulations 2020 – SI 670/2020
European Union (tax dispute resolution mechanisms) (amendment) regulations 2020 – SI 673/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 21) (commencement) order 2020 – SI 676/2020
European Union (amendment of pre-notification of imports) regulations 2020 – SI 677/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 5) (commencement) order 2020 – SI 680/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (construction products – market surveillance) regulations 2020 – SI 682/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 16) (commencement) order 2020 – SI 687/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 15) (commencement) order 2020 – SI 688/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Parts 17, 18, 19 and 20) (commencement) order 2020 – SI 693/2020
European Union (interbus agreement) regulations 2020 – SI 694/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 14) (commencement) order 2020 – SI 699/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (part 2) (commencement) order 2020 – SI 700/2020
European Union (Internal Market in Electricity) (Regulatory Authority Matters) Regulations 2020 – SI 704/2020
European Union (capital requirements) (amendment) regulations 2020 – SI 710/2020
European Union (Capital requirements) (no. 2) (amendment) regulations 2020 – SI 711/2020
European Union (restrictive measures concerning Iraq) (no. 2) regulations 2020 – SI 712/2020
European Union (bank recovery and resolution) (amendment) regulations 2020 – SI 713/2020
European Arrest Warrant Act 2003 (designated member states) (amendment) order 2020 – SI 719/2020
European arrest warrant (application to third countries) (United Kingdom) order 2020 – SI 720/2020
European Union (international cooperation) regulations 2020 – SI 721/2020
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (parts 8, 9, 10 and 11) (commencement) order 2020 – SI 723/2020
European Union (withdrawal agreement) (citizens' rights) regulations 2020 – SI 728/2020
European Union (security of natural gas supply) regulations 2020 – SI 745/2020
European Union (greenhouse gas emissions trading) (amendment) regulations 2020 – SI 755/2020

EVIDENCE

Consultative case stated – European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations 2013 – Unlawful detention – Trial judge stating a question of law for determination by the Court of Appeal – Whether breaches of the European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations 2013 rendered the detention of the defendant unlawful – [2020] IECA 304 – 11/11/2020
Director of Public Prosecution v Malai

Library acquisitions

Heffernan, L. *Evidence in Criminal Trials (2nd ed.)*. Dublin: Bloomsbury Professional, 2020 – M600.C5

Articles

Reilly, N. The business of evidence. *The Bar Review* 2020; (25) (5): 144

EXTRADITION LAW

European arrest warrant – Surrender – Lack of detail – Applicant seeking an order for the surrender of the respondent to the United Kingdom of Great Britain and Northern Ireland pursuant to a European arrest warrant – Whether the European arrest warrant failed to contain sufficient details – [2020] IEHC 657 – 10/12/2020
Minister for Justice and Equality v D.E.
European arrest warrant – Surrender – Article 3 of the ECHR – Applicant seeking an order for the surrender of the respondent to Romania pursuant to a European arrest warrant – Whether the surrender of the respondent would give rise to a violation of his rights guaranteed under Article 3 of the ECHR – [2020] IEHC 618 – 30/11/2020
Minister for Justice and Equality v Gheorghe
European arrest warrant – Surrender – European Arrest Warrant Act 2003 s. 45 – Applicant seeking an order for the surrender of the respondent to the Republic of Latvia pursuant to a European arrest warrant – Whether surrender was precluded by reason of s. 45 of the European Arrest Warrant Act 2003 – [2020] IEHC 569 – 30/10/2020
Minister for Justice and Equality v Jurcenoks
European arrest warrant – Surrender – Correspondence – Applicant seeking an order for the surrender of the respondent to the Republic of Croatia pursuant to a European arrest warrant – Whether surrender was precluded as correspondence could not be established between the offences in the European arrest warrant and offences under the law of the State – [2020] IEHC 690 – 14/12/2020
Minister for Justice and Equality v Rogic
European arrest warrant – Surrender – Correspondence – Applicant seeking an order for the surrender of the respondent to the Czech Republic pursuant to a European arrest warrant – Whether surrender was prohibited due to a lack of correspondence between any offence under Irish law and the offence set out at part (e)2 of the European arrest warrant – [2020] IEHC 573 – 11/11/2020
Minister for Justice and Equality v Sevcik
European arrest warrant – Surrender – Inhuman or degrading treatment or punishment – Applicant seeking an order for the surrender of the respondent to the Republic of Lithuania pursuant to a European arrest warrant – Whether there was a real risk of a breach of the respondent's right under article 3 of the European Convention on Human Rights not to be subjected to inhuman or degrading treatment or punishment – [2020] IEHC 692 – 16/12/2020
Minister for Justice and Equality v Valeska

FAMILY LAW

Barring order – Variation – Family Law Act 1995 – Applicant seeking an order varying the barring order that was made by the District Judge – Whether the High Court has the power to vary a barring order that has separately been granted by the District Court – [2020] IEHC 691 – 22/12/2020
C. v C.
Judicial separation – Ancillary orders – Costs – Respondent appealing against ancillary orders made on the granting of a decree of judicial separation – Whether the orders represented proper provision for the parties and the dependent children – [2020] IEHC 553 – 10/11/2020
H. v H.
Return – Consent – Grave risk – Appellant appealing from an order of the High Court that two children be returned to the jurisdiction of the courts of the Kingdom of Belgium – Whether the trial judge erred in her approach to the issue of consent – [2020] IECA 302 – 09/11/2020
J.V. v Q.I.
Family law – Divorce – Sale of property – Applicant seeking a decree of divorce – Whether the settlement arrangements contemplated the sale of all of the property or but two folios comprised within the property – [2020] IEHC 562 – 06/11/2020
M. v S.

Articles

O'Sullivan, B., Guildea, B. Clinical and Legal Aspects of Parental Alienation. *Irish Journal of Family Law* 2020; (23) (4): 101

FINANCIAL SERVICES

Acts

Finance (Miscellaneous Provisions) Act 2020 – Act 25/2020 – Signed on December 16, 2020

Statutory instruments

Appointment of special advisers (Minister for Finance) order 2020 – SI 522/2020
Appointment of special adviser (Minister of State at the Department of Finance) order – 2020 SI 531/2020
Appointment of special adviser (Minister for Finance) (no. 2) order 2018 – SI 584/2020
Finance (delegation of ministerial functions) order 2020 – SI 646/2020
Credit Union Act 1997 (regulatory requirements) (amendment) regulations 2020 – SI 675/2020
General government secured borrowings order 2020 – SI 750/2020

FISHERIES

Statutory instruments

Wild salmon and sea trout tagging scheme (amendment) regulations 2020 – SI 667/2020

GARDA SÍOCHÁNA

Statutory instruments

Garda Síochána (admissions and appointments) (amendment) regulations 2020 – SI 602/2020

Garda Síochána (reserve members) (amendment) regulations 2020 – SI 603/2020

Garda Síochána (associations) (amendment) regulations 2020 – SI 605/2020

GOVERNMENT

Statutory instruments

Appointment of special adviser (Minister of State at the Department of Foreign Affairs) order 2020 – SI 565/2020

Appointment of special adviser (Minister for Foreign Affairs and Minister for Defence) order 2020 – SI 583/2020

Oireachtas (allowances) (members and holders of parliamentary and certain ministerial offices) order 2020 – SI 613/2020

Appointment of special adviser (Minister of State at the Department of the Taoiseach) order 2020 – SI 751/2020

Appointment of special advisers (Taoiseach) order 2020 – SI 752/2020

GUARANTEES

Library acquisitions

Phillips, J., Courtney, W., O'Donovan, J. *The Modern Contract of Guarantee (4th ed.)*. London: Sweet & Maxwell, 2020 – N18.7

HEALTH

Acts

Health Insurance (Amendment) Act 2020 – Act 24/2020 – Signed on December 16, 2020

Statutory instruments

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 29) (health) (designation) order 2020 – SI 532/2020

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 31) (health) (designation) order 2020 – SI 533/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 8) (amendment) regulations 2020 – SI 535/2020

Health Act 1947 (fixed payment notice and dwelling event provisions) (Covid-19) regulations 2020 – SI 536/2020

Health Insurance Act 1994 (section 11E(2)) regulations 2020 – SI 538/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 9) regulations 2020 – SI 560/2020

Health Act 1947 (section 31A(6A)) (Covid-19) (no. 5) regulations 2020 – SI 561/2020

Health Act 1947 (fixed payment notice and dwelling event provisions) (Covid-19) (amendment) regulations 2020 – SI 562/2020

Pharmaceutical Society of Ireland (registration) (amendment) (no. 2) rules 2020 – SI 563/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (face coverings in small public service vehicles and certain premises) regulations 2020 – SI 569/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (face coverings in certain premises and businesses) (no. 2) regulations 2020 – SI 571/2020

Appointment of special adviser (Minister of State at the Department of Health) order 2020 – SI 597/2020

Appointment of special adviser (Minister of State at the Department of Health) (no. 2) order 2020 – SI 598/2020

Health (delegation of ministerial functions) (no. 3) order 2020 – SI 599/2020

Regulated Professions (Health and Social Care) (Amendment) Act 2020 (commencement of certain provisions) (no. 2) order 2020 – SI 647/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (amendment definition of face covering) regulations 2020 – SI 651/2020

Health Act 1947 (fixed payment notice and dwelling event provisions) (Covid-19) (amendment) (no. 2) regulations 2020 – SI 652/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 9) (amendment) regulations 2020 – SI 653/2020

Health Products Regulatory Authority (fees) regulations 2020 – SI 654/2020

Health and Social Care Professionals Act 2005 (special measures registration having regard to Covid-19) (no. 2) order 2020 – SI 689/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 9) (amendment) regulations (no. 2) 2020 – SI 695/2020

Health Act 1947 (section 31A(6A)) (Covid-19) (no. 5) (amendment) regulations 2020 – SI 696/2020

Health Act 1947 (fixed payment notice and dwelling event provisions) (Covid-19) (amendment) (no. 3) regulations 2020 – SI 697/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 10) regulations 2020 SI 701/2020

Health Act 1947 (section 31A(6A)) (Covid-19) (no. 6) regulations 2020 – SI 702/2020

Health Act 1947 (fixed payment notice and dwelling event provisions) (Covid-19) (amendment) (no. 4) regulations 2020 – SI 703/2020

Health Act 1970 (section 75A) order 2020 – SI 724/2020

Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (continuation of sections 7 and 8 of part 2) (no. 2) order 2020 – SI 740/2020

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (restrictions upon travel to the state from certain states) regulations 2021 – SI 3/2021

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 10) (amendment) regulations 2021 – SI 4/2021

HOUSING

Statutory instruments

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 29) order 2020 – SI 517/2020

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 31) order 2020 – SI 518/2020

Housing, local government and heritage (delegation of ministerial functions) (no. 2) order 2020 – SI 559/2020

Appointment of special adviser (Minister for Housing, Local Government and Heritage) (no. 2) order 2020 – SI 612/2020

Housing, local government and heritage (delegation of ministerial functions) (no. 2) order 2020 – SI 747/2020

IMMIGRATION

Family reunification – Constitutionality – International Protection Act 2015 s. 56 – Respondents appealing against the High Court's declaration that s. 56(9)(a) of the International Protection Act 2015 is repugnant to the Constitution – Whether s. 56(9)(a) of the International Protection Act 2015 is incompatible with the European Convention on Human Rights – [2020] IESC 70 - 08/12/2020

A and ors v Minister for Justice and Equality

Deportation – Disproportionality – Family and private life rights – Applicant challenging deportation order – Whether the respondent's decision was disproportionate – [2020] IEHC 643 - 16/12/2020

J.W. v The Minister for Justice and Equality (No.2)

Deportation orders – Orders of *certiorari* – Illegal Immigrants (Trafficking) Act 2000 s. 5(6) – Respondent seeking a certificate of the court pursuant to s. 5(6) of the Illegal Immigrants (Trafficking) Act 2000 – Whether the respondent rested proposed points of appeal on a mistaken factual and/or legal basis – [2020] IEHC 436 – 02/09/2020

M.H. and S.H. (a minor suing by her mother and next friend M.H.) v Minister for Justice and Equality (No.2)

Residence card – Judicial review – Member of household – Appellants seeking residence card – What are the circumstances in which parties may cite and rely on alternative language versions of Directives, Regulations or other EU instruments? – [2020] IESC 78 – 21/12/2020

S. v Minister for Justice

Statutory instruments

Immigration Act 2004 (visas) (amendment) (no. 2) order 2020 – SI 729/2020

INJUNCTIONS

Interlocutory injunctions – Article 8 of the European Convention on Human Rights – Proportionality – Appellants appealing against interlocutory injunctions – Whether the interference proposed by the respondent amounted to a proportionate interference with the right under Article 8 of the European Convention on Human Rights to respect for one's home – [2020] IECA 307 – 12/11/2020

Clare County Council v McDonagh

Order for possession – Interlocutory injunction – Damages – Plaintiff seeking an interlocutory injunction against the defendants – Whether damages would be an adequate remedy for the defendants – [2020] IEHC 619 – 01/12/2020

Coulston v Doyle

Costs – Interlocutory injunctions – Risk of injustice – Parties seeking costs – Whether the costs could be justly adjudicated upon at the interlocutory stage – [2020] IEHC 563 06/11/2020

Flogas Ireland Ltd v North West Gas Company Ltd

Interlocutory injunction – Sale – Settlement agreement – Plaintiffs seeking an interlocutory injunction restraining the defendants from selling a commercial/development site pending the trial of the action – Whether the balance of justice favoured granting an injunction prohibiting the defendants from selling the site – [2020] IEHC 533 – 29/09/2020

Ryan v Dengrove DAC

Interlocutory relief – Injunction – Appointment of receiver – Plaintiffs seeking interlocutory relief – Whether there was a fair question to be tried – [2020] IEHC 594 – 12/11/2020

Thompson v Tennant

INSURANCE

Insurance – Group income protection scheme – Conduct – Appellant appealing against a decision of the respondent – Whether the respondent's approach to his assessment of the appellant's conduct was erroneous in law – [2020] IEHC 538 – 10/11/2020

Utmost Paneurope DAC v Financial Services and Pensions Ombudsman

INTERNATIONAL LAW

Library acquisitions

de Londras, F., Mullally, S. *The Irish Yearbook of International Law Volume 13, 2018*. Oxford: Hart Publishing, 2020 – C100

Statutory instruments

International Protection Act 2015 (safe third country) order 2020 – SI 725/2020

International Protection Act 2015 (return order) regulations 2020 – SI 726/2020

International Protection Act 2015 (section 51B) (places of detention) regulations 2020 – SI 727/2020

IRISH LANGUAGE

Statutory instruments

Irish Sign Language Act 2017 (commencement) order 2020 – SI 658/2020

JUDICIAL REVIEW

Judicial review – International protection – Transfer – Applicant seeking judicial review – Whether the transfer of

international protection applicants to the United Kingdom would be in breach of Article 3(2) of EU Regulation 604/2013 – [2020] IEHC 647 – 08/12/2020
AHS v The International Protection appeals Tribunal
Judicial review – Deportation – Employment – Applicant seeking judicial review – Whether the respondent's consideration of the applicant's employment history and employment prospects was irrational, unreasonable and unlawful – [2020] IEHC 649 – 11/12/2020
BMAM v Minister for Justice and Equality
Judicial review – Withdrawal of guilty plea – Assault – Applicant seeking to challenge a decision of the Circuit Criminal Court to refuse to permit him to withdraw his plea in criminal proceedings – Whether any challenge to the ruling refusing to permit the withdrawal of the guilty plea should be determined in the context of the applicant's pending appeal before the Court of Appeal, rather than by way of judicial review before the High Court – [2020] IEHC 631 – 08/12/2020
Long v DPP
Judicial review – Guilty plea – Armed robbery – Applicant seeking judicial review – Whether the High Court had been misled as to the circumstances surrounding the applicant's trial before the Circuit Criminal Court – [2021] IEHC 12 – 05/01/2021
O'Callaghan v DPP
Judicial review – European Union (Award of Public Authority Contracts) Regulations 2016 – Right to fair procedures – Applicant seeking orders by way of judicial review quashing the decision of the respondent – Whether the decision made was *ultra vires* the decision-making powers of the respondent – [2020] IEHC 435 – 04/19/2020
Owens v Kildare County Council
Judicial review – Article 17(1) of the Dublin III Regulation – Discretion – Appellant seeking judicial review – Whether the trial judge erred in law in his interpretation of Article 17(1) of the Dublin III Regulation – [2020] IECA 357 – 18/12/2020
P.F. v International Protection Officer
Judicial review – Service of a summons – Preliminary hearing – Appellant seeking judicial review – Whether there was a denial of legal assistance and an unlawful interference with the appellant's rights under Article 6 of the European Convention on Human Rights – [2020] IESC 76 – 21/12/2020
Tracey v Judge Anderson

LAND LAW

Library acquisitions

Newsom, G.L. *Preston and Newsom's Restrictive Covenants Affecting Freehold Land (11th ed.)*. London: Sweet & Maxwell, 2020 – N65.6
Wylie, J.C.W. *Irish Land Law (6th ed.)*. Dublin: Bloomsbury Professional, 2020 – N60.C5

LANDLORD AND TENANT LAW

Notice of termination – Statutory tenancy – Point of law – Appellants appealing to the High Court on a point of law from a determination of the respondent to the effect that a notice of termination served in respect of a statutory tenancy was valid – Whether the respondent erred in law in finding that the landlord was entitled to rely on an intention to sell the dwelling as the basis for serving the notice of termination – [2020] IEHC 635 – 18/12/2020
Gunn v Residential Tenancies Board

LEGAL AID

Articles

Wall, R. Civil legal aid at critical juncture. *Law Society Gazette* 2020; (Nov): 58

LEGAL HISTORY

Library acquisitions

Dennehy, C. *Law and Revolution in Seventeenth-Century Ireland*. Dublin: Four Courts Press, 2020 – L401.C5

Articles

Quinn, G. The killing of Eileen Quinn. *Law Society Gazette* 2020; (Nov): 26

LEGAL PROFESSION

Misconduct – Solicitors' profession – Costs – Appellant seeking no order as to costs – Whether costs follow the event – [2020] IECA 262 – 04/06/2020
Sheehan practising under the style of Barry Sheehan Solicitor v Solicitors Disciplinary Tribunal

Library acquisitions

Byrne, R., McCutcheon, P., Cahillane, L., Roche-Cagney, E. *The Irish Legal System (7th ed.)*. Dublin: Bloomsbury Professional, 2020 – L13
Jesús González-Espejo, M., Pavon, J. *An Introductory Guide to Artificial Intelligence for Legal Professionals*. The Netherlands: Kluwer Law International, 2020 – L50
The Secret Barrister. *Fake Law: The Truth about Justice in an Age of Lies*. United Kingdom: Picador, 2020. Signed by the author – L86

Articles

da Gama, K. The world is not enough. *Law Society Gazette* 2020; (Dec): 40
Hallissey, M. Top of the world. *Law Society Gazette* 2020; (Nov): 32
Hardiman, A.-M. Law and literature. *The Bar Review* 2020; (25) (5): 136

Statutory instruments

Legal Services Regulation Act 2015 (section 218) (commencement) order 2020 – SI 604/2020
Solicitors Acts 1954 to 2015 (applications for removal from the roll of solicitors) regulations 2020 – SI 641/2020
Registered European lawyers qualifying certificate regulations 2020 – SI 642/2020
Legal services regulation act 2015 (advertising) regulations 2020
SI 644/2020
Legal Services Regulation Act 2015(commencement of certain provisions) order 2020 – SI 645/2020
Solicitors practising certificate regulations 2020 – SI 655/2020
Solicitors Act 1954 (section 44) (England and Wales) order 2020 – SI 741/2020
Solicitors Act 1954 (section 44) (Northern Ireland) order 2020 – SI 742/2020
Solicitors Act 1954 (section 44) (Scotland) order 2020 – SI 743/2020

LOCAL GOVERNMENT

Library acquisitions

Browne, D. *The Law of Local Government (2nd ed.)*. Dublin: Round Hall, 2020 – M361.C5

MEDICAL LAW

Statutory instruments

Medicinal products (prescription and control of supply) (amendment) (no. 6) regulations 2020 – SI 614/2020
Medical Practitioners Act 2007 (special measures registration having regard to Covid-19) (no. 2) order 2020 – SI 690/2020
Pharmacy Act 2007 (special measures registration having regard to Covid-19) (no. 2) order 2020 – SI 691/2020
Medicinal products (prescription and control of supply) (amendment) (no.7) regulations– 2020 SI 698/2020
Medicinal products (control of wholesale distribution) (amendment) regulations 2021 – SI 1/2021
Medicinal products (prescription and control of supply) (amendment) regulations 2021 – SI 2/2021

PARTNERSHIP LAW

Articles

Clancy, M. Limited partnerships – time for long-awaited reform. *Commercial Law Practitioner* 2020; (27) (9): 192

PENSIONS

Articles

Gillick, S. Can't take it with you. *Law Society Gazette* 2020; (Dec): 36

Statutory instruments

Public Service Pay and Pensions Act 2017 (section 27(3)) order 2020 – SI 632/2020
Public Service Pay and Pensions Act 2017 (section 42) (payments to general practitioners) (amendment) (no. 2) regulations 2020 – SI 685/2020
Occupational pension schemes (United Kingdom members) regulations 2020 – SI 717/2020

PERSONAL INJURIES

Remittal – Personal injuries – Interests of justice – Plaintiff seeking to remit the proceedings to the Circuit Court – Whether the interests of justice required a refusal of the relief sought in the motion – [2020] IEHC 640 – 30/11/2020
Briedis v Ryan Investments Trading as Hertz Rent A Car
Personal injuries – Informed consent – Particulars – Plaintiff seeking particulars – Whether the defendants were obliged to provide particulars of a denial pleaded in their defence – [2020] IECA 364 – 22/12/2020
Crean v Harty

PLANNING AND ENVIRONMENTAL LAW

Planning permission – Error of fact – Risk to public health – Applicant seeking planning permission – Whether the respondent's decision to refuse permission proceeded on the basis of a material mistake of fact – [2020] IEHC 642 – 04/12/2020
Baile Eamoinn Teoranta v An Bord Pleanála
Judicial review – Waste facility permit – Environmental impact assessment – Applicant seeking an order of *certiorari* quashing the determination of the respondent to grant the notice party a waste facility permit – Whether the respondent's decision was flawed and unlawful – [2020] IEHC 666 – 16/12/2020
Boylan v Limerick City and County Council
Planning and development – Judicial review – Jurisdiction – Applicant seeking *certiorari* of a decision of the respondent to grant permission for building heights in excess of those provided for in a planning scheme – Whether the respondent has jurisdiction to allow a material contravention of a strategic development zone planning scheme – [2020] IEHC 557 – 12/11/2020
Dublin City Council v An Bord Pleanála
Planning and development – Domestic law – Overshadowing – Applicants challenging permission for development – Whether the respondent erred in finding that there would be no overshadowing of existing homes to the north of the proposed development – [2020] IEHC 564 – 13/11/2020
Higgins v An Bord Pleanála
Judicial review – Substitute consent – Constitutionality – Applicant seeking judicial review – Whether the decisions of the respondents were valid – [2020] IEHC 651 – 04/12/2020
Liscannor Stone Ltd v Clare County Council
Judicial review – Substitute consent – Future planning permission – Applicant seeking judicial review – Whether the respondent's decisions were unlawful – [2020] IEHC 652 – 04/12/2020
Moore v An Bord Pleanála
Express permission – Validity – Leave application – Applicants seeking leave – Whether stay should be granted – [2020] IEHC 505 – 22/10/2020
North Westmeath Turbine Action Group v Westmeath County Council
Planning and development – Unauthorised retail development – Unauthorised signage – Applicant seeking to restrain the carrying out of unauthorised retail development – Whether the granting of relief ought to be stayed pending the determination of applications for retention of planning permission – [2020] IEHC 634 – 16/12/2020
Waterford City & County Council v Centz Retail Holdings Ltd

Articles
Hyde, D. Substitute consent: the goal posts have moved. *Irish Planning and Environmental Law Journal* 2020; (27) (1): 3

Statutory instruments
Planning and development (amendment) (no. 2) regulations 2020 – SI 692/2020
Waste management (prohibition of waste disposal by burning) (amendment) regulations 2020 – SI 738/2020

PRACTICE AND PROCEDURE
Adjournment – Right to a fair hearing – Mootness – Appellant seeking an adjournment of the hearing of a motion issued by the appellant – Whether the refusal to grant the appellant the adjournment sought denied him the right to a fair hearing of the issue the subject of the motion – [2020] IECA 340 – 03/11/2020
Hanrahan v The Minister for Agriculture, Food and the Marine
Summary judgment – Extension of time – Stay on judgment – Defendant seeking extension of time to appeal judgment – Whether basis for extending time had been demonstrated by defendant – [2020] IECA 303 – 10/11/2020
Havbell DAC v Flynn
Recusal – Isaac Wunder order – Joinder application – Appellant appealing against two orders made by the High Court – Whether the Isaac Wunder order made by the High Court should be set aside – [2020] IECA 289 – 22/10/2020
Houston v Doyle
Prosecution – Prohibition – Extension of time – Applicant seeking an order of prohibition – Whether an extension of time should be granted – [2020] IEHC 659 – 15/12/2020
M.S. v DPP
Summary judgment – Contracts – Service of proceedings – Defendants seeking orders setting aside service of the proceedings on them in Saudi Arabia – Whether the case was a proper one for service out of the jurisdiction [2020] IEHC 549 – 30/10/2020
Microsoft Ireland Operations Ltd v Arabic Computer Systems
European Enforcement Order – Costs – Remittal – Plaintiffs cross-appealing the refusal to issue a European Enforcement Order – Whether the claim of the plaintiffs against the defendants could be regarded as uncontested – [2020] IECA 301 – 09/11/2020
Monteriro Da Silva v Rosas Construtores
Interrogatories – Leave – Hearsay – Defendant seeking an order requiring the plaintiff to answer on affidavit interrogatories – Whether the interrogatories were invalid – [2020] IEHC 539 – 12/11/2020
Nahj Company for Services v Royal College of Surgeons in Ireland
Removal – Service of proceedings – Technicality – Appellant seeking to discharge the order made by the Master of the High Court – Whether the application concerned a technicality – [2020] IEHC 580 – 17/11/2020
R. v W.
Case management – Cross-appeal – Contributory negligence – Respondent bringing a cross-appeal – Whether it was appropriate for the cross-appeal to go ahead as planned – [2020] IESC 66 – 21/10/2020
University College Cork v The Electricity Supply Board
Recusal – Objective bias – Judicial review – Appellant seeking High Court judge's recusal – Whether there was basis for apprehension of bias – [2020] IECA 314 – 18/11/2020
Vehicle Tech Ltd v Commissioner of An Garda Síochána
Joinder – Counterclaim – Amendment – Defendant seeking to amend its counterclaim and to join two individuals as defendants to that proposed amended counterclaim – Whether there was a stateable case against the two individuals – [2020] IEHC 595 – 19/11/2020
Walters v Lexington Services Ltd

PRISON LAW
Habeas corpus – Unlawful detention – Rights of bodily integrity – Applicant seeking an order of habeas corpus under Article 40.4 of the Constitution – Whether the breach of the applicant's rights of bodily integrity was sufficiently egregious or exceptional or fundamental to render unlawful his detention – [2020] IEHC 639 – 07/12/2020
S.M. v The Governor of Cloverhill Prison

Articles
Mulcahy, J. Working in Irish prisons: perspectives from the front lines. *Irish Criminal Law Journal* 2020; (30) (3): 72

PROBATE
Articles
Keating, A., Dr. Probate in practice. *Conveyancing and Property Law Journal* 2019; (24) (3): 47 [part 1]; *Conveyancing and Property Law Journal* 2019; (24) (4): 71 [part 2]; *Conveyancing and Property Law Journal* 2020; (25) (1): 9 [part 3]; *Conveyancing and Property Law Journal* 2020; (25) (2): 36 [part 4]; *Conveyancing and Property Law Journal* 2020; (25) (3): 57 [part 5]; *Conveyancing and Property Law Journal* 2020; (25) (4): 83 [part 6]

PROPERTY
Sale – Jurisdiction – Equitable remedy – Appellants appealing the sale of their principal private residence – Whether the High Court correctly exercised the jurisdiction to order sale – [2020] IESC 77 – 21/12/2020
Trinity College Dublin v Kenny

Articles
Keane, P.E. That sinking feeling. *Law Society Gazette* 2020; (Dec): 32
Woods, Ú. The long and winding road of prescriptive rights and the registration requirement. *Irish Jurist* 2020; LXIV: 1

Statutory instruments
Registration of Deeds and Title Act 2006 (fees) order 2020 – SI 544/2020
Property Services (Regulation) Act 2011 (minimum standards) regulations 2020 – SI 564/2020

ROAD TRAFFIC
Library acquisitions
Bland, P. *Highways*. Dublin: Round Hall, 2020 – N322.C5

Statutory instruments
Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 29) (Road Safety Authority) (meetings of board) (designation) order 2020 – SI 520/2020
Road traffic (licensing of drivers) (amendment) (no. 10) regulations 2020 – SI 546/2020
Road traffic (national car test) (amendment) (no. 2) regulations 2020 – SI 555/2020
Road traffic (requirement to have audible warning devices on vehicles) regulations 2020 – SI 638/2020
Road traffic (lighting of vehicles) (amendment) regulations 2020 – SI 639/2020
Small public service vehicle (emergency measure Covid-19) (fees) regulations 2020 – SI 665/2020
Small public service vehicle (emergency measure Covid-19) (no. 2) regulations 2020 – SI 666/2020
Road traffic (recognition of foreign driving licences) (United Kingdom) order 2020 – SI 683/2020
Road traffic (licensing of drivers) (amendment) (no. 11) regulations 2020 – SI 684/2020

SECURITY FOR COSTS
Security of costs – Want of prosecution – Adjournment – Defendant seeking an order dismissing the plaintiff's claim for want of prosecution on account of the failure by the plaintiff to provide security for costs – Whether the proceedings ought to be adjourned – [2020] IEHC 629 – 04/12/2020
ER Travel Ltd v Dublin Airport Authority AKA DAA Plc

SOCIAL SERVICES
Judicial review – Jobseeker's Allowance – Social Welfare Consolidation Act 2005 s. 246(5) – Applicants seeking judicial review – Whether s. 246(5) of the Social Welfare Consolidation Act 2005 is unconstitutional – [2020] IEHC 654 – 20/11/2020
Razneas v The Chief Appeals Officer

Articles
Peters, N. Recovery of benefits and assistance scheme: aim and implementation. *Irish Law Times* 2020; (38) (19): 286

Statutory instruments
Social Welfare (No. 2) Act 2019 (section 16) (commencement) order 2020 – SI 551/2020
Social welfare (temporary provisions) regulations 2020 – SI 557/2020
Social welfare (consolidated claims, payments and control) (amendment) (no. 15) (Covid-19 pandemic unemployment payment – new band of payment and reference period) regulations 2020 – SI 572/2020
Social welfare (consolidated claims, payments and control) (amendment) (no. 16) (Covid-19 pandemic unemployment payment – ancillary provisions) regulations 2020 – SI 573/2020
Social welfare (consolidated claims, payments and control) (amendment) (no. 16) (Covid-19 pandemic unemployment payment – ancillary provisions) regulations 2020 – SI 574/2020
Social welfare (consolidated claims, payments and control) (amendment) (no. 18) (treatment benefit payment by the minister) regulations 2020 – SI 716/2020
Social welfare (Convention on Social Security between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland) order 2020 – SI 746/2020

STATISTICS
Statutory instruments
Statistics (monthly balance of payments survey) order 2020 – SI 581/2020
Statistics (aircraft transaction register survey) order 2020 – SI 582/2020
Statistics (census of population) order 2020 – SI 637/2020
Statistics (quarterly accounts survey) order 2020 – SI 649/2020
Statistics (wood inputs survey) order 2020 – SI 650/2020

STATUTORY INTERPRETATION
Library acquisitions
Greenberg, D. *Craies on Legislation: A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation (12th ed.)*. London: Sweet & Maxwell, 2020 – L35

SUCCESSION
Articles
Adanan, A., Dr. Succession law and cohabitation after 10 years of the civil partnership and certain rights and obligations of cohabitants act 2010. *Conveyancing and Property Law Journal* 2020; (25) (4): 70

TAXATION
Library acquisitions
Buckley, M. *Capital Tax Acts 2020*. Dublin: Bloomsbury Professional, 2020 – M335.C5.Z14
Maguire, T. *The Taxation of Companies 2020*. Dublin: Bloomsbury Professional, 2020 – M337.2.C5

Articles
Duffy, B., Kearns, R. Great expectations. *Law Society Gazette* 2020; (Nov): 42

Statutory Instruments
Value-added tax regulations 2010 (regulation 14A) (amendment) regulations 2020 – SI 734/2020
Value-added tax regulations 2010 (regulation 34A) (amendment) regulations 2020 – SI 735/2020

Value-added tax regulations 2010 (regulation 15) (amendment) regulations 2020 – SI 736/2020
Value-added tax regulations 2010 (regulation 37) (amendment) regulations 2020 – SI 737/2020

TORT

Articles

Downey, G. Clarity for Concurrent Wrongdoers? *The Bar Review* 2020; (25) (5): 140

TOURISM

Statutory instruments

Tourism, culture, arts, Gaeltacht, sport and media (delegation of ministerial functions) order 2020 – SI 547/2020
Tourism, culture, arts, Gaeltacht, sport and media (delegation of ministerial functions) (no. 2) order 2020 – SI 548/2020

TRANSPORT

Statutory instruments

Aircraft Noise (Dublin Airport) Regulation Act 2019 levy no. 2 regulations 2020 – SI 537/2020
Merchant shipping (navigation and tracking) (heading systems and testing of steering gear) rules 2020 – SI 589/2020
Aviation Regulation Act 2001 (levy no. 21) regulations 2020 – SI 601/2020
Merchant shipping (passenger ships) rules 2020 – SI 640/2020
Harbours Act 2015 (Galway Harbour Company transfer day) order 2020 – SI 661/2020
Merchant shipping (pilot transfer arrangements) rules 2020 – SI 686/2020
Appointment of special advisers (Leader, Minister for the Environment, Climate and Communications and Minister for Transport) order 2020 – SI 754/2020

TRIBUNALS

Statutory instruments

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 29) (International Protection Appeals Tribunal) (designation) order 2020 – SI 714/2020
Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 31) (International Protection Appeals Tribunal) (designation) order 2020 – SI 715/2020

VALUATION

Case stated – Valuation – Property – Valuation Tribunal stating a question of law for the determination of the High Court – Whether the Valuation Tribunal had been correct in excluding the valuations of two properties prior to the amalgamation thereof into the property the subject of the valuation, when coming to its determination as to the true valuation thereof – [2020] IEHC 661 – 16/12/2020
Dayhoff Ltd v Commissioner of Valuation

Judicial review – Joinder – Valuation Act 2001 – Commissioner of Valuation seeking to be joined as a notice party or respondent – Whether the Commissioner had established that he was directly affected by the outcome of the judicial review proceedings – [2020] IEHC 670 – 10/19/20202
Gavigan v Valuation Tribunal

WATER

Statutory instruments

Water Services Act 2017 (membership of water forum) regulations 2020 – SI 526/2020
Water Services (No. 2) Act 2013 (property vesting day) (no.3) order 2020 – SI 681/2020

YEARBOOK

Library acquisitions

Institute of Public Administration. *Ireland – A Directory 2021 (55th ed.)*. Dublin: Institute of Public Administration, 2020 – Ref

Bills initiated in Dáil Éireann during the period November 13, 2020, to January 14, 2021

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

Air navigation and transport bill 2020 – Bill 72//2020
Appropriation bill 2020 – Bill 75/2020
Central Mental Hospital (relocation) bill 2020 – Bill 70/2020
Counterfeiting bill 2020 – Bill 77/2020
Housing (standards for rented houses) bill 2020 – Bill 65/2020 [pmb] – Deputy Eoin Ó Broin
Measuring quality of life in Ireland bill 2020 – Bill 64/2020 [pmb] – Deputy Ged Nash
Organisation of working time (amendment) (carryover of annual leave) (Covid-19) bill 2020 – Bill 68/2020 [pmb] – Deputy Louise O'Reilly
Organisation of working time (domestic violence leave) bill 2020 – Bill 58/2020 [pmb] – Deputy Louise O'Reilly and Deputy Mary Lou McDonald
Organisation of working time (amendment) (right to disconnect) bill 2020 – Bill 54/2020 [pmb] – Deputy Louise O'Reilly
Proceeds of crime (gross human rights abuses) bill 2020 – Bill 69/2020 [pmb] – Deputy Brendan Howlin
Protection of children (online pornographic material) bill 2020 – Bill 57/ 2020 [pmb] – Deputy Peadar Tóibín
Regulation of lobbying (amendment) bill 2020 – Bill 62/ 2020 [pmb] – Deputy Pearse Doherty and Deputy Mairéad Farrell
Road traffic (all-terrain vehicle and scrambler motorcycle) (amendment) bill 2020 – Bill 59/2020 [pmb] – Deputy Paul McAuliffe and Deputy John Lahart
Social welfare bill 2020 – Bill 66/2020
Social Welfare Commission bill 2020 – Bill 67/2020 [pmb] – Deputy Claire Kerrane
Statistics (decade of centenaries) bill 2020 – Bill 74/2020 [pmb] – Deputy Aengus Ó Snodaigh
Thirty-ninth amendment of the Constitution (remote parliamentary voting) bill 2020 – Bill 73/2020 [pmb] – Deputy Jennifer Carroll MacNeill
Wind turbine regulation bill 2020 – Bill 63 of 2020 [pmb] – Deputy Brian Stanley
Working from home (Covid-19) bill 2020 – Bill 55/2020 [pmb] – Deputy Alan Kelly, Deputy Brendan Howlin, Deputy Ged Nash, Deputy Aodhán Ó Ríordáin, Deputy Seán Sherlock and Deputy Duncan Smith

Bills initiated in Seanad Éireann during the period November 13, 2020, to January 14, 2021

Deportation moratorium (Covid-19) bill 2020 – Bill 71/2020 [pmb] – Senator Alice-Mary Higgins, Senator Eileen Flynn, Senator Frances Black and Senator Lynn Ruane
Health insurance (amendment) bill 2020 – Bill 60/2020
Personal insolvency (amendment) bill 2020 – Bill 76/2020
Planning and development bill 2020 – Bill 56/2020

Progress of bills and bills amended in Dáil Éireann during the period November 13, 2020, to January 14, 2021

Criminal justice (money laundering and terrorist financing) (amendment) bill 2020 – Bill 23/2020 – Committee Stage
Defence (amendment) bill 2020 – Bill 2/2020 – Committee Stage
Finance bill 2020 – Bill 43/2020 – Committee Stage – Report Stage – Passed by Dáil Éireann
Finance (miscellaneous provisions) bill 2020 – Bill 61/2020 – Committee Stage
Harassment, harmful communications and related offences bill 2017 – Bill 63/2017 – Committee Stage
Planning and development bill 2020 – Bill 56/2020 – Committee Stage
Public service pay bill 2020 – Bill 78/2020
Social welfare bill 2020 – Bill 66/2020 – Committee Stage
Withdrawal of the United Kingdom from the European Union (consequential provisions) bill 2020 – Bill 48/2020 – Committee Stage

Progress of bills and bills amended in Seanad Éireann during the period November 13, 2020, to January 14, 2021

Central Mental Hospital (relocation) bill 2020 – Bill 70/2020 – Committee Stage
Criminal justice (theft and fraud offences) (amendment) bill 2020 – Bill 1/2020 – Committee Stage
Finance bill 2020 – Bill 43/2020 – Committee Stage – Passed by Seanad Éireann
Finance (miscellaneous provisions) bill 2020 – Bill 61/2020 – Committee Stage – Passed by Seanad Éireann
Health insurance (amendment) bill 2020 – Bill 60/2020 – Committee Stage
Irish nationality and citizenship (naturalisation of minors born in Ireland) bill 2018 – Bill 124/2018 – Committee Stage
Planning and development bill 2020 – Bill 56/2020 – Committee Stage – Report Stage
Withdrawal of the United Kingdom from the European Union (consequential provisions) bill 2020 – Bill 48/2020 – Committee Stage

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

Bills and legislation
http://www.oireachtas.ie/parliament/
http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Supreme Court Determinations – Leave to appeal granted Published on Courts.ie – November 13, 2020, to January 14, 2021

DPP v B.S. [2020] IESCDET 130 – Leave to appeal from the Court of Appeal granted on the 20/11/2020 – (O'Donnell, J., Charleton, J., O'Malley, J.)
DPP v Cassidy [2020] IESCDET 141 – Leave to appeal from the Court of Appeal granted on the 15/12/2020 – (Clarke, C.J., MacMenamin, J., Baker, J.)
J.J., In re, (No. 1) [2020] IESCDET 133 – Leave to appeal from the Court of Appeal granted on the 30/11/2020 – (O'Malley, J., O'Donnell, J., Baker, J.)
J.J., In re (No. 2) [2020] IESCDET 132 – Leave to appeal from the Court of Appeal granted on the 30/11/2020 – (O'Malley, J., O'Donnell, J., Baker, J.)
McD v The Governor of X Prison [2020] IESCDET 134 – Leave to appeal from the Court of Appeal granted on the 14/12/2020 – (Clarke, C.J., MacMenamin, J., Dunne, J.)
Minister for Justice and Equality v Smits [2020] IESCDET 131 – Leave to appeal from the High Court granted on the 20/11/2020 – (O'Donnell, J., Charleton, J. O'Malley, J.)
S.T.E., A.A. and others v The Minister for Justice and Equality [2020] IESCDET 124 – Leave to appeal from the Court of Appeal granted on the 30/10/2020 – (O'Donnell, J., Charleton, J. O'Malley, J.)

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

Drug driving: recent developments

The commencement of the Road Traffic Act 2016 has greatly assisted the detection and prosecution of drug driving offences.

David Staunton BL

When it comes to detecting drug drivers, gardaí do not always encounter Jeff Spicoli types, emerging from a vintage Volkswagen van amidst a plume of smoke as vividly depicted in the movie *Fast Times at Ridgemont High*. In real-world conditions, the presentation of those driving with drugs in their system is often more subtle and not as readily detectable when compared to intoxication by alcohol. This is notwithstanding the fact that a person may be similarly – if not more severely – impaired by drugs.

Although the prevalence of drug driving was recognised as far back as 2000,[1] it was not until the commencement of the Road Traffic Act 2016 (the 2016 Act) that specific drug driving offences came to be on the statute books.[2] Prior to this, gardaí investigating such offences were reliant on a rather archaic statutory framework for dealing with intoxicated drivers first introduced in the Road Traffic Act 1961. This legislative regime was ill suited to cater for the nuances associated with intoxication and incapacity due to drugs and, as such, a more focused and scientific approach was long overdue.

In conjunction with other legislative measures facilitating investigators, such as the introduction of random mandatory checkpoints,[3] the 2016 Act has already proved its worth in real terms.

For example, the capacity to test for drugs in the saliva of drivers at the side of the road has greatly assisted detections in recent times. In 2020, notwithstanding the drastic reduction in traffic on the roads due to the pandemic, the increased presence of garda checkpoints where the new provisions are deployed has demonstrated the prevalence of drug driving.[4]

The pre-2016 regime

Prior to the 2016 Act, allegations of drug driving were exclusively dealt with under both ss.4(1) and 5(1) of the Road Traffic Act 2010.[5] These provisions were, in reality, a regurgitation of what was first enacted in the Road Traffic Act 1961.

In prosecutions of this nature, proof was required that a person was not only under the influence of an intoxicant but also to such an extent as to render that person incapable of having proper control of a vehicle.[6] Theoretically, a

person could be intoxicated but if there was no demonstrable incapacity to drive, convictions were hard to come by. This is to be contrasted with alcohol concentration offences for blood, urine and breath specimens found elsewhere in s.4 and s.5.[7] In such cases, a person is either over or under the prescribed limit.

As such, proving the link between intoxication and incapacity was not always a straightforward affair. While a prosecution of this nature could be sustained solely on a garda's opinion relating to a person's state of intoxication in conjunction with the manner of a person's driving, given the subjective nature of that evidence, it was not always possible to prove, beyond a reasonable doubt, all the requisite elements of the offence. For example, prosecutions frequently failed where the trial courts held that a person's appearance or behaviour was not conclusively as a result of an intoxicant, or equally, it may not always have been possible to show that a minor episode of improper control of a vehicle was due to intoxication.[8]

Although in more recent times the gardaí were assisted by the Medical Bureau of Road Safety's capacity to analyse specimens of blood and urine for drugs, the statutory regime only extended to certification for the presence of a drug.[9] Frequently, however, such evidence did not advance drug driving allegations to any great extent as – notionally – the presence may only have constituted a trace element of a given drug.

The 2010 Act: a step in the right direction

With the enactment of the 2010 Act, the Oireachtas began the process of reducing reliance on subjective opinion evidence.

Among the measures was the formal introduction of so-called impairment tests.[10] Here a garda may require a person to undergo non-technological cognitive tests for the purposes of assessing whether or not a person's capacity to drive is impaired.[11] When this section was commenced in 2014,[12] it was the first time the Oireachtas had expressly provided a statutory basis for impairment testing. This is surprising given the enthusiasm for such testing in other jurisdictions.[13]

Another significant measure allowed for opinion evidence to be provided by a designated doctor or nurse regarding the condition and capacity of a person to drive.[14] Under the provisions, a garda may require a person to undergo a medical examination so as to ascertain whether a person was at the material time "under the influence of an intoxicant as to be incapable of having proper control of a vehicle".

Although both of the above powers were on the statute book for a number of years prior to the commencement of the 2016 Act, the anecdotal evidence would suggest that the provisions were rarely – if ever – invoked. In reality, there remained a significant reliance on subjective, non-scientific opinion evidence, along with certificates indicating merely the presence of a drug or drugs.

Why this was the case remains unclear. Although the impairment provisions were somewhat cumbersome, the failure to engage a designated doctor or nurse to provide a clinical view as to whether a person was under the influence of an intoxicant rendering them incapable of having proper control of a vehicle is inexplicable. This is especially so as each and every person who was suspected of being under the influence of drugs would invariably interact with a doctor or nurse at the point at which a specimen of blood was taken or urine provided. As such, it seems strange why – at the same time – a doctor or nurse was not asked to express a view and potentially bolster the prosecution case.

The 2016 Act: a leap forward

The introduction of preliminary oral fluid testing

When the 2010 Act commenced, in line with previous provisions allowing for preliminary specimens at the roadside, gardaí were only entitled to require specimens to indicate the "presence of alcohol in the breath".[15] Under the 2016 Act, gardaí are now also entitled to require a person to provide a preliminary specimen for "indicating the presence of drugs in oral fluid".[16] The apparatus used[17] is "able to detect cannabis, cocaine, opiates and benzodiazepines in [the] oral fluid" of a person at the roadside or following arrest.[18]

The capacity to screen for drugs at the roadside is a very significant development and its utility is readily apparent. The indiscriminate nature of the testing process means that persons who might previously have been waved on at a checkpoint because of the absence of any apparent signs of intoxication can no longer expect such treatment.

Two new offences: Sections 4(1A) and 5(1A) of the Road Traffic Act 2010

As indicated, prior to the 2016 Act, there was no specific offence of exceeding the concentration of a specified drug. With the new ss.4(1A)[19] and 5(1A),[20] a person whose blood shows a concentration of a drug "equal to or greater" than the prescribed concentration now commits an offence.

Under Sch. 1 of the Road Traffic Act 2010,[21] the five drugs with a prescribed concentration are: Δ9-tetrahydrocannabinol (cannabis); 11-nor-9-carboxy-Δ9-tetrahydro-cannabinol (cannabis); cocaine; benzoylecgonine (a metabolite of cocaine); and, 6-acetylmorphine (heroin).

Where a person is arrested under one of the specified provisions,[22] or attends at a hospital, a garda is now entitled to require a person to permit a designated doctor or nurse to take a specimen of blood only.[23] The power is aimed at expressly facilitating blood specimens to be analysed for the concentration of drugs.[24]

While the power to compel blood is an important step in the legislative regime, the statutory preconditions for exercising such a power seem rather superfluous.[25] They include the requirement to, inter alia, carry out a preliminary screening test along with specifically forming a view that an offence has been committed under ss.4(1A) or 5(1A). No such preconditions exist in other similar provisions allowing for specimens to be obtained.[26] In practice, cases have already been dismissed because of the failure to comply with the specific terms of the section.

Comment

The enactments under the 2016 Act are to be welcomed.

- With specific drug concentration offences now provided for under ss.4(1A) and 5(1A), the prosecution of such cases is now markedly easier. In line

with alcohol offences, there is no longer a requirement to prove any link between intoxication and incapacity, as was previously the case.

- The availability of oral fluid testing at the roadside is probably the greatest addition to the investigative armoury since preliminary alcohol screening was first introduced in the Road Traffic Act 1968. Having the capacity to almost instantaneously detect for drugs means that a garda no longer has to assess matters solely based on their observations prior to effecting an arrest.

- That being said, there have been more hurdles erected in terms of steps in the investigative process. While the legislative aims are undoubtedly laudable and overdue, once more the Oireachtas has failed to draft legislation with a focus on how it will operate in the real world. The statutory pre-conditions for the taking of a blood specimen, for example, are yet another example of needless complexity.

- At present, the Oireachtas has specified a one-year mandatory minimum disqualification for offences of exceeding the concentration of a drug under ss.4(1A) and 5(1A). Unlike with alcohol, where the disqualification period is linked to the level of alcohol in a person's system, all drug drivers – irrespective of how far they are over the permitted concentration – are treated the same. Naturally, this has the capacity to lead to unfairness. A staggered system of disqualifications – in turn reflecting the level of culpability of persons – would seem to be merited.

References

1. In 2000, the Department of the Environment and Local Government commissioned the Medical Bureau of Road Safety to carry out a nationwide survey in relation to drug driving. The Bureau subsequently issued a report, 'Driving under the Influence of Drugs in Ireland: Results of a Nationwide Survey 2000-2001'. The report found that there was a "significant driving under the influence of drugs problem in Ireland". The Bureau also noted that 68% of persons who had essentially zero levels of alcohol were in fact positive for one or more drugs on subsequent analysis.
2. Sections 4(1A) and 5(1A) of the Road Traffic Act 2010, as inserted by s.8 of the Road Traffic Act 2016. These provisions took effect on April 13, 2017 (S.I. No. 129 of 2017).
3. Section 10 of the Road Traffic Act 2010.
4. Cf. Lally, C. Drug driving: 'Middle class, middle-aged, in the middle of the day'. *The Irish Times*, July 20, 2020.
5. Namely driving or attempting to drive (s.4) and being in charge with the intent to drive or attempt to drive (s.5). For completeness, ss.4 and 5 of the Road Traffic Act 2010 replaced the previous provisions found under ss.49 and 50 of the Road Traffic Act 1961.
6. Under s.3(1) of the Road Traffic Act 2010, an "intoxicant" includes alcohol and drugs, and any combination of drugs or of drugs and alcohol.
7. See ss.4(2), (3) and (4), and ss.5(2), (3) and (4) of the Road Traffic Act 2010.
8. As appositely noted by Henchy J. in *State (Collins) v Kelleher* [1983] I.R. 388 at 391 of the report: "The offence [of driving under the influence of an intoxicant] is more difficult of proof since it involves a qualitative and, therefore, somewhat subjective assessment of the driving, and of [an intoxicant] as a causative factor, whereas the offence under [exceeding the concentration of an intoxicant], depends primarily and essentially on a quantitative factor, namely, whether the driver drove when the concentration … in his system exceeded the prescribed limit".
9. See S.I. No. 173/2001 – Road Traffic Act, 1994 (Part III) (Amendment) Regulations 2001.
10. Section 11 of the Road Traffic Act 2010, which is now substituted by s.12 of the Road Traffic Act 2016.
11. The Road Traffic Act 2010 (Impairment Testing) Regulations 2014 (the 2014 Regulations) prescribe the tests that may be carried out on persons in accordance with s.11. The prescribed tests provided for in Sch.1 of the Regulations are: (i) pupillary examination; (ii) the modified Romberg balance test (described as "an indicator of a person's internal clock and ability to balance"); (iii) walk and turn test; (iv) one leg stand; and, (v) finger to nose test.
12. Section 11 of the 2010 Act, as substituted by s.11 of the Road Traffic Act 2014, with effect from November 26, 2014 (S.I. No. 536 of 2014).
13. For example, in the UK, s.6B of the Road Traffic Act 1988 introduced similar measures with effect from March 30, 2004. It is worth noting that prior to s.11, there was some doubt about the admissibility of the results of any impairment testing in the absence of affirmative proof that a person had voluntarily submitted to such an examination in line with the principles protecting the right against self-incrimination. Cf. *Sullivan v Robinson* [1954] I.R. 161 and *Attorney General (Crotty) v O'Keeffe* [1955] I.R. 24.
14. Section 24(1) of the Road Traffic Act 2010.
15. See ss.9 and 10 of the Road Traffic Act 2010.
16. See s.9(2A) of the Road Traffic Act 2010, as inserted by s.10(c) of the Road Traffic Act 2016; s.10 of the Road Traffic Act 2010, as inserted by s.11 of the Road Traffic Act 2016; and, s.13A(1) of the Road Traffic Act 2010, as inserted by s.13 of the Road Traffic Act 2016 and substituted by s.2(1)(a) of the Road Traffic (Amendment) Act 2018.
17. Dräger DrugTest® 5000.
18. Medical Bureau of Road Safety. Annual Report 2018: 10.
19. Section 4(1A) of the Road Traffic Act 2010, as inserted by s.8(a) of the Road Traffic Act 2016.
20. Section 5(1A) of the Road Traffic Act 2010, as inserted by s.8(b) of the Road Traffic Act 2016.
21. As inserted by s.8(c) of the Road Traffic Act 2016. These provisions took effect on April 13, 2017 (S.I. No. 129 of 2017). Under ss.4(1B) and 5(1B), the provisions do not apply to a person in respect of the drugs Δ9-tetrahydrocannabinol (cannabis) or 11-nor-9-carboxy-Δ 9-tetrahydro-cannabinol (cannabis) where the person is the holder of a "medical exemption certificate" in the prescribed form, which indicates that at the time at which that drug was found to be present in his or her blood, Δ9-tetrahydrocannabinol had been lawfully prescribed for him or her, and which is signed by the doctor who prescribed it. See the Road Traffic Act 2010 (Medical Exemption Certificate) Regulations 2017 (S.I. No. 158 of 2017).
22. The specified provisions are: s.4(8), 5(10), 9(4), 10(7) or 11(6) of the Road Traffic Act 2010, or s.52(3), 53(5), 106(3A) or 112(6) of the 1961 Act.
23. Section 13B(1) of the Road Traffic Act 2010, as inserted by s.13 of the Road Traffic Act 2016 and substituted by s.2(1)(b) of the Road Traffic (Amendment) Act 2018. The historical position – beginning with Part V of the Road Traffic Act 1968 – was that where a bodily sample was being compelled, a person could permit the taking of a blood specimen or, in lieu, provide a urine specimen. The rationale presumably was that if one method could not be availed of for one reason or another, the other could. This dual option approach was found in all of the subsequent legislative enactments up to and including ss.12(2) and 14(1) of the Road Traffic Act 2010.
24. Section 17(1)(c), as substituted by s.14 of the Road Traffic Act 2016. The Medical Bureau of Road Safety has confirmed that a specimen of urine can technically be analysed for the concentration of drugs. However, no analysis for the concentration of drugs takes place under s.17(1)(c) in respect of urine specimens that are forwarded to it.
25. See s.13B(1) of the Road Traffic Act 2010.
26. See sections 12(2) and 14(1) of the Road Traffic Act 2010.

Climate change and the Supreme Court

The recent Supreme Court decision in the Climate Case is a cause for celebration among environmental activists, but is also a decision of considerable interest for public lawyers in Ireland.

John Kenny BL

Introduction

Climate change is an existential problem for all of us. Unless serious and rapid changes are made by the end of the century, global temperatures will have increased by four degrees and, as per the Environmental Protection Agency (EPA): "…the world as we know it would be bound to disappear". Those changes will include the loss of all coral reefs, the loss of the rainforests and Arctic sea ice, and entire ecosystems that depend on them. As identified by the Intergovernmental Panel on Climate Change (IPCC), it will result in the dislocation of millions of people, an increase in extreme weather events, and widespread drought and food poverty. If the planet maintains its current rates of greenhouse gas (GHG) emissions, these effects will be felt with full force by 2050.

Ireland's contribution

Ireland's contribution to this problem is lamentable. Ireland emits an entirely disproportionate amount of GHGs. In 2017, Ireland had the third highest emissions per capita in the EU, 51% higher than the EU average. Unlike many of the other member states, Ireland was (and remains) on track to miss by significant margins its binding legal obligations to reduce GHG emissions by 25-40% by 2020 and by 80-95% by 2050 (both compared to 1990 levels). The State's own Climate Change Advisory Council put it in blunt terms in its 2018 Annual Review:

"Ireland's greenhouse gas emissions for 2016, and projections of emissions to 2035, are disturbing. Ireland's greenhouse gas emissions increased again in 2016…Climate change is already having an impact in Ireland. Recent extreme weather events revealed the vulnerability of many communities, services and utilities to disruption…Ireland is completely off course in terms of its commitments to addressing the challenge of climate change".

The National Mitigation Plan

The State's primary policy response to this was contained in the National Mitigation Plan (the Plan) published in July 2017. The publication of the

Plan was required pursuant to s.4 of the Climate Action and Low Carbon Development Act 2015 (the Act). That Act required the Plan to, *inter alia*, specify the manner in which it is proposed to achieve the national transition objective; namely, transitioning to a low-carbon, climate-resilient and environmentally sustainable economy by the end of the year 2050.

The Plan did not, even remotely, do that. What the Plan as adopted by Government provided for was a significant increase in GHG emissions between 2017 and 2035, followed by a dramatic decrease in GHG emissions between 2035 and 2050. The Plan did not explain how the State was going to achieve this level of dramatic reduction other than by referring to unidentified "additional measures" that would be included in future plans. Nor did it provide any explanation for the State's failure in missing, by a very significant margin, the interim 2020 target.

"Ireland's greenhouse gas emissions for 2016, and projections of emissions to 2035, are disturbing. Ireland's greenhouse gas emissions increased again in 2016…Climate change is already having an impact in Ireland. Recent extreme weather events revealed the vulnerability of many communities, services and utilities to disruption…Ireland is completely off course in terms of its commitments to addressing the challenge of climate change".

The *Urgenda* decision

That position stands in stark contrast to the position in the Netherlands. The Dutch Government was on course to reduce GHG emissions by 23% by 2020 (as against 1990 levels). However, despite that progress, a very large number of individual applicants joined litigation designed to compel the Dutch State to reduce those emissions by 25% on the basis that this was the minimum reduction identified by the IPCC for the planet to have any chance to keep temperature increase to 1.5 degrees.

In December 2019, the Dutch Supreme Court concluded that the failure to achieve the 25% reduction target constituted a breach of Articles 2 and 8 of the European Convention on Human Rights (ECHR). The Court emphatically rejected the Government's arguments that the matters were non-justiciable and/or that the level of reduction achieved was sufficient.[1]

Climate case

Inspired by that litigation, and with considerable assistance from the Dutch legal team and Matrix Chambers in the United Kingdom, Friends of the Irish Environment (FIE) instituted judicial review proceedings of the Ireland Plan in October 2017. FIE has been active in Irish environmental litigation for many years. Those proceedings contained a number of objections to the Plan, including that:

- the State had breached the applicant's ECHR rights *a la* the *Urgenda* decision;
- the State had breached the applicant's constitutional right to life and right to an environment consistent with human dignity;[2]
- the State had failed to discharge its obligations pursuant to the 2015 Act, and,
- the adoption of the Plan was irrational and that the appropriate standard of review in judicial reviews was a more searching proportionality review rather than the threshold identified in *The State (Keegan) v Stardust Victims Compensation Tribunal*.[3]

FIE is a non-governmental organisation (NGO) that operates as a limited company. There was no individual litigant in the case as a result of apprehension as to the possibility of a very significant adverse award of costs in the event that the litigation was lost. The absence of any personal litigant had, in due course, a significant impact on the course of the litigation.

The other unusual feature of the case was a determination by FIE to use the proceedings to mobilise as many people as possible around general climate issues. It was branded as 'Climate Case' with its own website, petition, social media presence and outreach events, all co-ordinated by FIE's solicitor Dr Andrew Jackson, and operated and run by volunteers.

The case ran before McGrath J. in January 2019. Perhaps uniquely in judicial review proceedings, Court 29 was packed to the rafters with people of all ages and backgrounds throughout the five days. The unique atmosphere was captured by the *Irish Examiner*: "The end of the world was never foretold with such calm".

In a hushed courtroom, Eoin McCullough, senior counsel, presented what lay ahead: intense heatwaves, extended drought, cyclones, wildfires, floods, loss of biodiversity, destruction of ecosystems, widespread displacement of people, catastrophic breakdown of life as we know it – the barrister delivered the climate change forecast in composed, almost reassuring tones.

Not that anyone wanted to be assured of the kind of terrors he outlined. Especially not when 14-month-old Mary Barry was bum-shuffling her way around the courtroom, blissfully oblivious to the fact that before she is 14 years old, the world will have to drastically change its ways or suffer irrevocable consequences.[4]

The High Court judgment

The High Court delivered its judgment in September 2019.[5] It held against FIE and in favour of the State on all points.

While the Court accepted the gravity of the climate change problem, the Court concluded that it had no remit to review the efficacy of the policies selected by the State to further the national transition objective. The Court held that the *Keegan* line of jurisprudence precluded the more intensive review of the Plan contended for by FIE. The Court accepted the State's

argument that there was no necessity to identify in the Plan how it was proposed to achieve an 80% reduction in GHG emissions by 2050 and, once the Plan contained proposals in that regard, the Court could not trespass into questions of policy.[6]

In addressing the human rights aspects of the claim, the Court started its analysis by concluding that:

- FIE had failed in its claim that the Plan was *ultra vires* the requirements of the Act; and,
- had not challenged the constitutionality of the Act; and therefore,
- it was precluded from raising any argument that the adoption of the Plan constituted a human rights violation.[7]

This approach is, with respect, an unusual approach. There may be nothing objectionable in the parent Act, and the Plan may be consistent with that Act, but the adoption of the Plan may still (as in *Urgenda*) represent an impermissible violation of human rights.

The Court proceeded, however, to address the rights elements of the FIE proceedings.

It noted that in the interim since the institution of the proceedings, the Supreme Court had held in *Mohan v Ireland and ors*[8] that there was no such thing as an *"actio popularis"* and therefore FIE (as a company) was precluded from raising any rights claim that could only vest in a human person. The Court went on to hold that even if it had such standing, the measures within the Plan fell within the margin of appreciation for the purposes of the ECHR.[9]

Leapfrog

FIE sought and was ultimately granted a leapfrog appeal by the Supreme Court on the grounds that its proceedings raised issues of exceptional public importance. This was not opposed by the State.

The Supreme Court provided a Statement of Case giving its understanding of the issues raised in advance. Practitioners should note that while the State forcefully objected at the hearing of the action that FIE had not adequately pleaded its case in relation to the Act in its Notice of Appeal, it had not raised that objection in its Respondent's Notice, in its written submission or in its response to the Statement of Case. In rejecting the State's objection, the Court placed considerable emphasis on these factors, and was clearly of the view that an objection raised for the first time by counsel on their feet was far too late to be entertained. That mechanism greatly assisted in allowing the case to be heard over two days before a seven-judge Court in June 2020. By the time the hearing came on, the Covid-19 pandemic meant that the case was heard in the Dining Hall of the King's Inns with only a very limited attendance.

The Supreme Court judgment

The Supreme Court delivered a unanimous judgment in July 2020.[10] Chief Justice Clarke gave the only judgment and quashed the Plan on the basis that the State had failed to comply with its obligations pursuant to the 2015 Act. While the Court's decision has been a cause of some significant celebration, it is a decision of some considerable interest for public lawyers in Ireland. Three major elements of the decision are notable:

A. Justiciability

The central plank of the State's defence in both the High and Supreme Court was that as the Plan was clearly polycentric, there was a long line of authority to the effect that it was non-justiciable. The State's fall-back argument was that while the process by which the Plan was adopted may be justiciable, the policy contents of it could not be.

The Court rejected both of these arguments. The 2015 Act is prescriptive in relation to both the contents of the Plan and the process by which it had to be adopted. The Court held that:

"…it does seem to me to be absolutely clear that, where the legislation requires that a plan formulated under its provisions does certain things, then the law requires that a plan complies with those obligations and the question of whether a plan actually does comply with the statute in such regard is a matter of law rather than a matter of policy. It becomes a matter of law because the Oireachtas has chosen to legislate for at least some aspects of a compliant plan while leaving other elements up to policy decisions by the government of the day. … a question of whether the Plan meets the specificity requirements in s.4 is clearly justiciable".[11]

Although mildly expressed, this approach marks a striking departure in the Court's approach to judicial review of Governmental action. Whereas previously the mere fact that Governmental action involved policy choices was enough to preclude any further review of those choices, the Supreme Court went much further and assessed both the presence and the adequacy of those measures. As the Court put it:

"The level of specificity required of a compliant plan is that it is sufficient to allow a reasonable and interested member of the public to know how the government of the day intends to meet the National Transition Objective".[12]

This approach means that the burden of justification resting on a State authority seeking to justify its choice of measures adopted pursuant to, in theory, any Act, is now considerably more onerous.

A significant step has been taken towards a position where the State must show not only that it has met the mandatory contents prescribed by an Act, but also demonstrate that the policy choices will in fact achieve the objectives prescribed by that Act. The decision appears to mark, at least, a considerably less deferential approach to policy choice questions by the Supreme Court and a departure from a long line of jurisprudence stretching back to *TD v Minister for Education*.[13]

B. Standing

The Court, having found for FIE on that issue, went on nonetheless to consider whether a company could raise human rights objections. The Court concluded that it had no such standing. In doing so, it dismissed out of hand the costs exposure rationale offered by FIE as the reason why no human person had taken the case.

With respect to the Court, it is unclear why the Court did not regard this

as a good reason. Nor did the Court engage with the reality of a costs regime that means that significant human rights cases could only be taken by litigants-of-straw, companies or unincorporated associations. It is true that a person could have taken the case and applied for no order of costs to be made against them, in the event that they were unsuccessful, on the basis that the matters were of significant public importance. However, any such application could only be made once the case had run its course and very significant legal costs had been incurred. When considered in conjunction with *Mohan*, the effect of the Court's decision is that it will be very difficult to raise human rights objections unless a litigant either with nothing to lose or who is willing to risk potential ruin can be found.

This is particularly acute in climate litigation. Climate change affects everybody but it may be difficult for any one individual to demonstrate how they have a sufficient interest to maintain a case. Where the impacts are diffuse, demonstrating immediate concrete loss or harm may be impossible.

It also does not, with respect, appear to be consistent with the approach taken in *Irish Penal Reform Trust v Minister for Justice*.[14] In that case Gilligan J. had allowed the Irish Penal Reform Trust, a limited company, to raise human rights breaches on the grounds, *inter alia*, that it was one of the few organisations that had the capacity to do so. The same considerations appear to apply in relation to systemic environmental issues such as those raised in Climate Case and it is perhaps unfair to expect any individual to hazard ruin in order to engage in litigation of this nature.

C. Derived rights

The Court went on to make a series of *obiter* comments in relation to the unenumerated right to an environment consistent with human dignity identified in *Fingal*. The Court held that there was no such right because in the Court's view it lacked sufficient definition. While it had become a side issue given the Court's view on standing, the Court's observations signify that the unenumerated rights doctrine may have substantially run its course. The Court did not have to engage with this issue but went out of its way to do so. It is also noteworthy that this represents, as far as can be established, the first time that an unenumerated right has been recognised by the High Court but subsequently removed from Article 40.3 by the Supreme Court. If the Court is correct that the problem for the contended for right is its lack of definition, then it is difficult to see how any future unenumerated right could survive the scrutiny of the Court – the concept of a right to bodily integrity has, for example, developed significantly from its genesis in marital privacy in 1965.[15] It is inherent in the nature of unenumerated rights that they are only defined over the course of time and in the context of judicial analysis. Mr Justice Barrett was surely correct to observe that recognition had to be followed by subsequent clarification in *Fingal*:

"…Concrete duties and responsibilities will fall in time to be defined and demarcated. But to start down that path of definition and demarcation, one first has to recognise that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed. This the court does".[16]

Conclusion

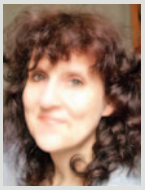
The decision of the Supreme Court was greeted with widespread acclaim.[17] It marks an important statement by the Court that the State's negligent approach to our climate responsibilities will no longer be tolerated. A unanimous Supreme Court determination that the State is in serious breach of its obligations sends a clear message that unless there is a sea change in the State's approach, the Court will intervene in a judgment of general application to administrative law. That development is tempered by a much more conservative approach to the question of both standing and unenumerated rights that will have significant resonance in future litigation.

References

1. *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* (judgment of December 21, 19/00135).
2. As identified by Barrett J. in *Friends of the Irish Environment v Fingal County Council (Dublin Airport)* [2017] IEHC 695.
3. [1986] IR 642, at 658.
4. O'Doherty, C. It's like Climate Change has a voice in the room. *Irish Examiner*, January 22, 2019.
5. *Friends of the Irish Environment v Government of Ireland and ors* [2019] IEHC 747.
6. Para 116 of the judgment.
7. Para 121.
8. [2019] IESC 18, at paragraph 11. The Court also relied upon the decision of McKechnie J. in *Digital Rights Ireland Ltd v. Minister for Communications* [2010] 3 I.R. 251.
9. Para. 143.
10. *Friends of the Irish Environment v Government of Ireland and ors* [2020] IESC 747.
11. Paragraphs 6.27-6.28.
12. Paragraph 6.38.
13. [2001] IESC 101.
14. [2005] IEHC 305.
15. *Ryan v Attorney General* [1965] IESC 1.
16. *Fingal*, *ibid*, at paragraph 264.
17. See, e.g., Ryall, A. Supreme Court ruling a turning point for climate governance in Ireland. *The Irish Times*, August 7, 2020.

Vulnerable witnesses – a lot done, more to do

There have been a number of developments in the approach to victims and vulnerable witnesses, but several difficulties remain to be resolved.



Dr Miriam Delahunt BL

The publication of the Harassment, Harmful Communication and Related Offences Act 2020 is a welcome development. The Act attempts, in a practical way, to deal with cyber bullying and revenge porn. In addition, following the recommendations of the O'Malley Report, the Minister for Justice and Equality published a comprehensive report in October last year, 'Supporting a Victim's Journey – A plan to help victims and vulnerable witnesses in sexual violence cases', outlining a timeline to resolve issues in the prosecution of sexual offences in this jurisdiction.

These developments follow the Criminal Justice (Victims of Crime) Act 2017, which raises the standard of treatment for the victim of crime from initial report to sentencing. It overlaps significantly with the Criminal Evidence Act 1992 (CEA) in relation to the use of support measures at trial. It is unfortunate that the CEA remains largely untouched, the provisions being extended rather than significantly revised. This has led to confusion and anomalies regarding many provisions where eligibility is based on age, intellectual disability, the nature of the offence, or whether the person is a victim or a witness.

Delay and absence of guidance

While the CEA was amended to allow the recording of examination in chief of children under 18, there is no revision as to when the oath or affirmation might be taken (the previous age parameters allowed for testimony taken under 14 to be admitted without oath or affirmation). In the absence of legislative guidance, practitioners may look to case law from other jurisdictions to resolve the issue.[1]

As delay is a fundamental problem in our system, restricting recording to examination in chief evidence may cause stress for the witness who must remain available for cross-examination at trial. It also undermines the accused's right to a fair trial as his or her counsel may have to cross-examine a witness about an event that occurred some time ago. While the Minister's report recognises that the issue of delay needs to be prioritised, a debate is necessary to consider whether legislation should be introduced to provide for pre-recorded cross-examination for vulnerable witnesses.

The Good Practice Guidelines (2003), which provide procedural guidelines for recorded testimony, have not been updated. As a result, cherry picking practices from neighbouring jurisdictions occurs and discrete issues are resolved differently in separate courts. For instance, contrary to previous practice, two recent cases have seen the recordings of examination in chief testimony go into the jury room as exhibits with the consent of the defence.[2]

Use of intermediaries

The use of intermediaries from Northern Ireland in an Irish courtroom appears to have become more frequent despite the difference in legislative provisions and procedures within the two jurisdictions. There is no panel of Irish intermediaries for Irish courts to draw on but the Minister's Report does propose a plan for the training of Irish intermediaries. However, the CEA, which provides for the use of intermediaries in this jurisdiction, has not been fundamentally revised, and there appears to be no proposal to do so. While the Report notes that the role is one akin to an interpreter, the legislation does not allow the intermediary to assist with the interpretation of answers given by the witness. This is limiting where the witness has significant speech or cognitive issues. Further, the use of intermediaries is inextricably linked with the use of video link, limiting its use in relation to a witness who may wish to testify in the body of the court. There is no legislative provision for a declaration to be made by intermediaries but it appears that an oath, similar to one taken by court translators, is being administered at present. There is no published current procedural guidance to assist the courts or practitioners in the use of intermediaries and the parameters of their role at trial.

There appears to be no proposal for the use of intermediaries for vulnerable defendants as is currently the case in Northern Ireland, and England and Wales. All the provisions of the CEA relate to vulnerable witnesses or victims, an issue that should be addressed given that vulnerable defendants increasingly appear before the higher courts.

Pre-trial hearings

The Minister's stated commitment to the commencement of legislation to provide for pre-trial/preliminary hearings before this summer is extremely welcome. Legislative provision for these hearings has been needed for some time, the General Scheme of the Criminal Procedure Bill being available since 2015.

Our legislation and our procedural guidance in this area is deficient and issues are being resolved on an ad hoc basis. Advocates may need to consider following international practice and, in certain circumstances, adapting to the witness rather than vice versa. Without revised legislation and updated procedural guidance, counsel and the courts may be unaware of how to resolve new issues or avail of current solutions. This leads to delay, uncertainty and an inconsistency of approach. Both the accused and the victim have a right to far better treatment by our courts.

References

1. For instance, the Northern Ireland case of *R v N* [1998] NI 261.
2. *DPP v F.N.* (CCDP0072/20, December 2020); *DPP v S.K.* (CCDP0124/20200, December 2020). See also *DPP v P.P.* [2015] IECA 152.

THE BAR
OF IRELAND
The Law Library

DO YOU NEED A LEGAL OPINION?

DIRECT PROFESSIONAL ACCESS SCHEME

A facility for approved bodies and their members to brief barristers directly.

1. Check if your association or organisation is approved **here**
2. If already approved, you can contact one of our 1,825 barristers **directly**
3. Find a barrister with the specialism or area of practice that you need **here**
   - **Read our guidelines of instructing a barrister**
4. Your association or organisation not on the scheme?
   - **Application process here**

Note that legal services under the scheme do not extend to contentious matters (e.g. court appearances)

Terms of engagement are a matter between barristers and contracting body.

JLT
A Mercer business

The Bar of Ireland Retirement Trust Scheme

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

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 right).

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.

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%

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

Contact your JLT Bar of Ireland Pension Team on 01 636 2700 or Donal Coyne via email at dcoyne@jlt.ie

JLT Financial Planning Ltd
Charlotte House,
Charlemont Street,
Dublin 2, NV26

MARSH & McLENNAN COMPANIES