THE BAR REVIEW

THE BAR OF IRELAND
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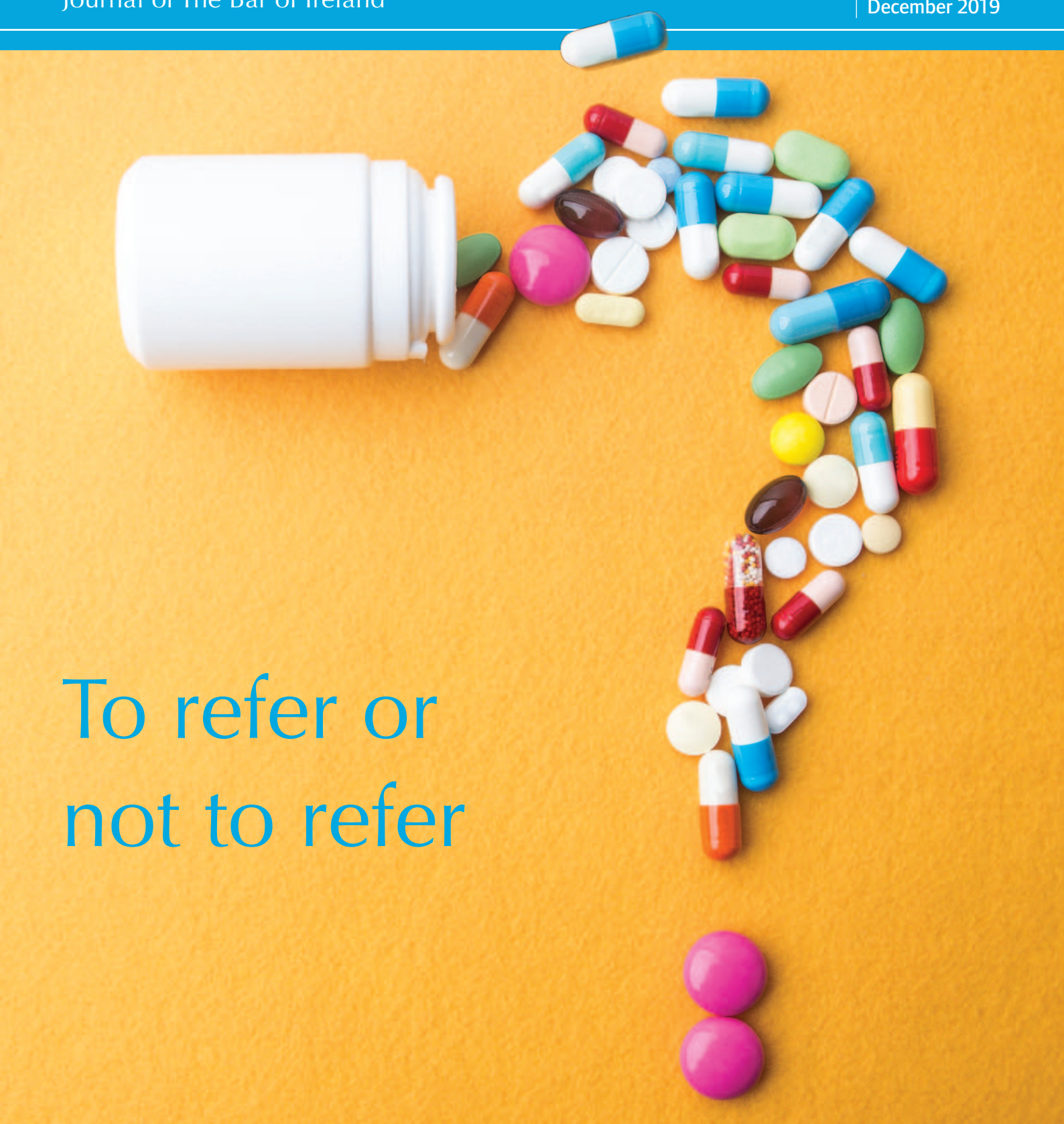

To refer or not to refer

JUST ARRIVED

Irish Conveyancing Law

By J C W Wylie and Una Woods

This is the essential guide to conveyancing law and practice. This fourth edition reflects changes in practice resulting from the pre-contract deduction and investigation of title system introduced by the Law Society's Conditions of Sale 2019 Edition and Requisitions on Title (2019 Edition). The book explains the changes resulting from key legislation including the Land and Conveyancing Law Reform Act 2009 and Property Services (Regulation) Act 2011. The book further incorporates the substantial case law since the last edition in which the text is frequently cited as authoritative.

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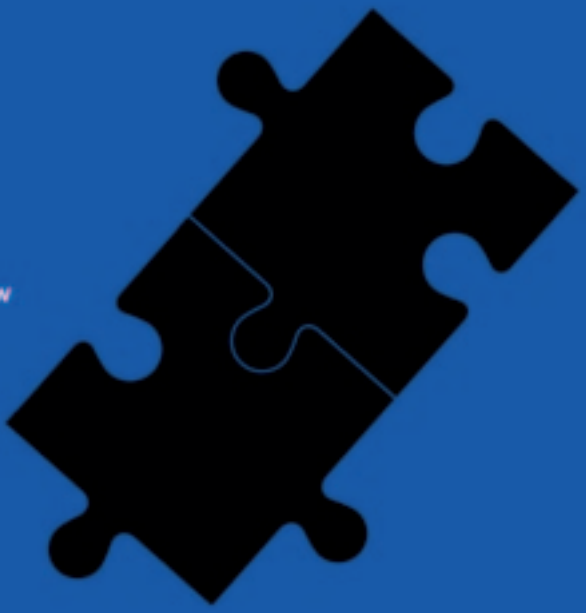
By Michael Twomey
Edited by Maedhbh Clancy

Limited Liability Partnerships (LLPs) are now part of Irish law for partnerships between barristers and solicitors.

Twomey on Partnership has been completely revised and updated to include a whole new section on LLPs, partnerships between barristers and solicitors and other changes to partnership law.



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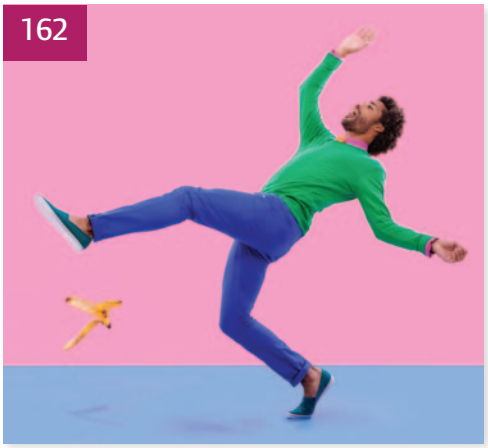

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Safeguarding justice at the Bar

The Council continues its work, including launching a new publication to highlight our advocacy to external audiences.

The Bar of Ireland Human Rights Award 2019

One of the honours I have as Chairman is that I sometimes get to meet extraordinary people. In November I was privileged to present The Bar of Ireland Human Rights Award 2019 to Tomi Reichental for his work in promoting tolerance and educating young people about the importance of remembrance and reconciliation. Tomi is one of three Holocaust survivors currently residing in Ireland. For the past decade, he has spoken out and tirelessly campaigned, speaking to schools, clubs and conferences, so that the victims of the Holocaust will not be forgotten. He is truly a remarkable human being. All who attended the award ceremony were moved and inspired by his story.

The Bar of Ireland Human Rights Award is an initiative of our Human Rights Committee, chaired this year by Tim O'Leary SC. It aims to promote justice and respect for human rights through the rule of law. The Committee does valuable work and the annual award ceremony is an important event in the Law Library calendar.

Oireachtas Committee – access to justice and legal costs

The Council was invited to appear before the Joint Committee on Justice and Equality in November to address the topics of access to justice and legal costs. Appearing along with the Free Legal Advice Centres (FLAC), the Legal Aid Board and the Law Society, we used the opportunity to call for increased investment in legal aid. It is vital that access to the legal system is supported and protected to the greatest extent possible. It is the Council's view that investment in legal aid and any proposals for reform should not be undertaken in isolation. A wide range of improvements are required so that timely and efficient access to justice is available to those persons who need it. The Council has demonstrated in various submissions to Government agencies that it is ready and willing to work with all stakeholders to realise these essential reforms. The Council has called for these measures to be supported by appropriate levels of funding to ensure the efficient administration of justice.

The Joint Committee on Justice and Equality has invited other groups to appear before it in the coming weeks, including the Legal Services Regulatory Authority, the Competition Authority, and the State Claims Agency. We will continue to monitor and engage with the Joint Committee on this important topic, and look forward to the publication of its final report in 2020.

LSRA developments – Section 150

Members will by now be aware that the costs provisions of the Legal Services Regulation Act 2015 (Part 10) were commenced in October. The Council published guidance for members in relation to Part 10 and held a CPD/information event that was very well attended in early November. The guidance is accessible on the newly laid out members' section of our website under the Professional Practice section. Included in the guidance are some sample section 150 notices. It was not possible to provide a template notice, as there are too many variables through all possible areas of practice. However, it is hoped that the samples provided can be adjusted as necessary to meet a member's individual requirements.

Members have raised queries about their obligations when they are regularly instructed on behalf of, for example, an institutional client where the client discharges fees in line with its own scale, or where a member reasonably apprehends that their fee will be determined by the client rather than the member him or herself. The Council is engaging with State agencies and authorities that regularly instruct counsel to discuss a mechanism that will comply with the Act, and yet take account of the reality of how fees paid by such bodies are calculated. We will inform members of the outcome of those engagements in due course.

Communications

Those who have participated on the Council over many years will be aware of the vast amount of voluntary work undertaken on members' behalf. Communicating all of this important work is an ongoing challenge. We use several platforms to communicate with members, including *The Bar Review*, weekly *In Brief* e-zine, fortnightly Education & Training Bulletin, monthly Events Bulletin, monthly *Barometer*, noticeboards, website, Twitter, and LinkedIn. This term we have added another new publication for the purpose of communicating the advocacy work we undertake to external audiences (politicians, NGOs, State agencies, and civil and public servants), which is also available for members to peruse – our new policy newsletter *Safeguarding Justice*. This newsletter has been developed as part of a new *Safeguarding Justice* campaign overseen by the Public Affairs Committee, and will issue to key decision-makers on a periodic basis. It highlights the range of advocacy work undertaken by the Council over the past few months on the reform and development of legislation, and the operation of the justice system, through submissions and engagement with key stakeholders, including State bodies and the media.

I encourage all members to keep abreast of these communication channels.

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

Extraordinary lives and changing times

Tomi Reichental was sent to Bergen-Belsen as a young child. Now in his 80s, he is one of the last surviving witnesses of the horrors of the concentration camps. He now dedicates his life to educating people about the Holocaust in an effort to counter the rise of far-right politics and racism in Ireland and abroad. We are privileged to carry an inspirational interview with this extraordinary man on the occasion of his receipt of the 2019 Bar of Ireland Human Rights Award.

We also look at the initiative to reap some positive effects from the unending gloom that is Brexit. John Bruton has been appointed to a new implementation group to promote Ireland as a centre for legal services post Brexit, and he shares his insight into what the group is hoping to achieve.

Section 150 of the Legal Services Regulation Act 2015 has now come into effect, and heralds a new regime in respect of legal costs in this jurisdiction. One significant aspect of the new rules is that failure to comply with Section 150 could limit the recovery of fees when the matter goes to taxation. Our writer analyses the implications of the new provisions.

Given the continuing political and media focus on personal injury litigation, we carry an analysis of the new Personal Injuries Guideline Committee, which is expected to play a key role in moulding the future of personal injury awards. Separately, we take a look at the role of solicitors in referring clients to medical consultants in the furtherance of litigation.

We are pleased to enclose with this edition a collection of the interviews which have been published in *The Bar Review* since its relaunch in February 2016.

A very big thank you to all our contributors and the members of our editorial board for sharing their knowledge and expertise throughout the year. Happy Christmas to one and all.

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

Human rights champion

From left: Micheál P. O'Higgins SC, Chairman, Council of The Bar of Ireland; Tomi Reichental; and, Tim O'Leary SC, Chairperson, Human Rights Committee of The Bar of Ireland.

Holocaust survivor Tomi Reichental was presented with The Bar of Ireland Human Rights Award at a special ceremony on Thursday, November 28. Tomi travels to schools all over Ireland to tell his story, and to teach a message of tolerance and reconciliation. The Human Rights Award is an initiative of the Bar of Ireland Human Rights Committee, and past recipients have included the Irish Naval Service, and historian Catherine Corless.

Employment Bar Association

Pictured at the EBA Conference were (from left): EBA Chair Clíona Kimber SC; Patricia King, General Secretary, Irish Congress of Trade Unions; Marguerite Bolger SC, speaker; and, Lorna Lynch BL, speaker.

The Employment Bar Association (EBA) hosted its 2019 Annual Conference on Friday, November 22, in the Atrium, Distillery Building. There were 200 attendees, including members of the Law Library, solicitors and other guests. The chairperson for panel 1 was Patricia King, General Secretary of the Irish Congress of Trade Unions, and the chairperson for panel 2 was Ms Justice Leonie Reynolds, Judge of the High Court. Speakers included Marguerite Bolger SC, Feichín McDonagh SC, Peter Ward SC, Kevin Bell BL, Sarah Daly BL, Lorna Lynch BL, and Cathy Smith BL.

Council addresses Oireachtas Committee

Back row (from left): Catherine Ryan, Managing Solicitor, Law Centre Limerick, and Legal Aid Board; Conor Dignam SC, Vice-Chairman, The Bar of Ireland; Ken Murphy, Director General, Law Society of Ireland; John McDaid, Chief Executive, Legal Aid Board; Seán Ó hUallacháin SC, The Bar of Ireland; Jim O'Callaghan TD; Thomas Pringle TD; and, Catherine Connolly TD. Front row (from left): Philip O'Leary, Chairperson, Legal Aid Board; Ciara Murphy, Chief Executive, The Bar of Ireland; Committee Chairman Caoimhghín Ó Caoláin TD; Michele O'Boyle, President, Law Society of Ireland; Eilis Barry, Chief Executive, Free Legal Advice Centres (FLAC); and, Deirdre Malone, Legal Manager, Public Interest Law Alliance.

On November 27, Conor Dignam SC, Seán Ó hUallacháin SC and Ciara Murphy, Chief Executive, appeared before the Oireachtas Justice Committee on behalf of the Council of The Bar of Ireland, alongside representatives from the Free Legal Advice Centres (FLAC), the Legal Aid Board and the Law Society, to discuss the very important topics of access to justice and legal costs.

Justice is a fundamental value of utmost importance in the life of every citizen, and members of the Law Library, the independent referral bar, play a vital role in promoting and safeguarding an equal right of access to justice. Council representatives highlighted the importance of legal aid as a vital component to ensuring a person's constitutional right of access to the courts. They stressed the need for significant additional investment in civil legal aid if the scheme is to provide meaningful aid to the most vulnerable sectors of society on a long-term and sustainable basis. Urgent improvements are required across the scheme, including in terms of eligibility and the areas of law to which civil legal aid applies. The severe cuts that were applied to barristers' fees during the economic downturn were also highlighted. These cuts have made it unviable for many legal practitioners to continue to participate in State-funded schemes such as the civil and criminal legal aid schemes. As a consequence, many new entrants to the Law Library are voting with their feet and choosing not to practise in legally aided areas such as crime and family law. If the situation is not addressed, it will undoubtedly have a profound effect on the administration of justice and the public good.

Reforms to the legal aid system cannot occur in isolation. The smooth and efficient administration of justice requires investment in the justice system as a whole. The Council stressed how constricting budgets are making it harder for the courts to do their work, compounded by a continuing shortage of judges. The recent increase in the number of judges appointed to the Court of Appeal to 15 is welcomed; however, Ireland continues to have one of the lowest numbers of judges per 100,000 inhabitants. This deficit must be confronted as a possible factor in delays and inefficiencies of the courts system.

A wide range of improvements are required, so that timely and efficient access to justice is accessible to all those who need it. Reforms to the discovery process, the increased use of electronic filing and service procedures, improvements to the process for listing cases, enhanced case management tools across all courts, and class action litigation, are but some of the changes that would increase the efficiency of civil litigation in Ireland and reduce costs. The outcome of the work of the Administration of Civil Justice Review Group, chaired by the President of the High Court, Mr Justice Peter Kelly, provides an opportunity to address many of these issues, and the Council called for any such recommendations to be supported by appropriate funding.

On the issue of legal costs, the Council recognises that unduly high legal costs can constitute a barrier to access to justice, and it has long supported the recently enacted provisions of the Legal Services Regulation Act 2015 dealing with legal costs and the fair delivery of legal services to the citizens of Ireland. The Council outlined in its submission how the market for barristers' services is more competitive than it has ever been. Increased transparency in legal costs under part 10 of the Act will have the inevitable effect of generating more competition among legal service providers. By increasing the amount of information available to consumers about the price of legal services, it enables consumers to make informed decisions about which lawyer to choose and at what rates. Clients are empowered to shop around and ensure that they obtain the best representation and the best value for money.

The Council further highlighted the strong *pro bono* tradition at the Bar through participation in the Voluntary Assistance Scheme (VAS) and a number of community outreach projects that operate outside of the Bar.

A copy of the full submission can be found on www.lawlibrary.ie.

EU Bar Association event

EUBA morning panel (from left): Suzanne Kingston BL; Colm Mac Eochaidh, Judge at the General Court, Court of Justice of the European Union; Françoise Kamara, doyenne de la première chambre civile de la Cour de cassation (moderator); Thomas Picot, lawyer at the Paris Bar; and, Thierry de Bovis, attorney at law, former référendaire at the Court of Justice of the European Union.

The EU Bar Association (EUBA) hosted its first international event in Paris on Friday and Saturday, November 8 and 9, 2019. The joint conference on commercial dispute resolution in Europe was held by the EUBA in association with the Paris Bar. The sessions were chaired by Françoise Kamara, doyenne de la première chambre civile de la Cour de cassation, and Mr Justice Robert Haughton.

Bar maternity subscription

On October 24, The Bar of Ireland launched a new policy to support female members of the Law Library in the period after having a baby. The initiative, driven by the Equality, Diversity and Inclusion (EDI) Committee, in conjunction with the Library Committee, was spearheaded by the Women at the Bar Working Group, which, in response to the findings of the Women at the Bar Survey carried out in 2016, sought ways in which female members could be empowered to balance their practice at the Bar with having a family.

As The Bar of Ireland is a membership organisation and all members are self-employed, there are constraints on the assistance that can be provided to members who take time away from their practice. However, a valuable contribution that The Bar of Ireland can and does offer is the financial space to take time away in the form of a reduced membership subscription for the duration of leave, or the option to remain in practice and still benefit from a subscription reduction for the first year post partum.

Members can learn more about the new maternity policy in the Members' Section of the Law Library website, or by contacting memberservices@lawlibrary.ie.

IWLA Gala celebrates 2019 Woman Lawyer of the Year

Back row (from left): Grainne McMorrow SC, founder member, IWLA; Maura Butler, former IWLA Chair; Hilkka Becker, Chair, International Protection Appeals Tribunal; Noeline Blackwell, CEO, Dublin Rape Crisis Centre; Rosemarie Hayden, IWLA PRO; Tracey Donnery, Executive Director, SkillNet Ireland; Carol Plunkett, Chair, Law Society Education Committee; Attracta O'Regan, Head of Law Society Professional Training; Rina Bacik; Paula Reid, Partner, A&L Goodbody, Finuas Skillnet Steering Committee; Emma Hartnett, IWLA Treasurer; Sonia McEntee, Law Society Council; Jane McGowan BL, Chair, Irish Criminal Bar Association; Anne Conlon BL, IWLA Committee; Barbara Carroll, Law Society HR Director; and, Eileen Ewing, NI Law Society Vice President.

Front row (from left): Nora Gibbons, former Chair, TUSLA; Ellen O'Malley Dunlop, Chair, National Women's Council of Ireland; Ciara Hanley, IWLA Secretary; Maeve Delargy, IWLA Chair; Catherine McGuinness, IWLA President; Ivana Bacik BL, IWLA Woman Lawyer of the Year 2019; Cathy Smith BL, IWLA Vice-Chair; Aisling Gannon, Partner, Eversheds Sutherland, IWLA Committee; Suzanne Rice, President, Law Society of Northern Ireland; and, Colette Reid, Law Society Faculty.

Senator Ivana Bacik was named the Irish Women Lawyers Association (IWLA) Woman Lawyer of the Year at the IWLA Annual Gala on October 19. This highlight of the legal year provides the opportunity for women lawyers to socialise and network in a collegial atmosphere, and has led to many IWLA initiatives including, most recently, the IWLA Sub Committee on Climate Justice. This networking is an all-island project with the IWLA delighted to host Law Society of Northern Ireland President Suzanne Rice and Senior Vice President Eileen Ewing at the event.

Senator Bacik received her Award from long-time activist colleague, former Supreme Court Justice and President of the IWLA, Catherine McGuinness. She accepted the Award by exhorting those in attendance to, in the words of Constance Markievicz, "wear short skirts and sturdy boots…and carry a revolver" in order to avoid the sticky floor that continues to affect female participation in higher levels of the legal profession. The event was hosted in collaboration with Law Society Finuas Skillnet in the Law Society of Ireland, with thanks to Evershed Sutherlands.

Addressing domestic violence

Pictured at The Bar of Ireland's conference on domestic violence, which was held in collaboration with An Garda Síochána on November 1, 2019, were (from left): Sarah Benson, CEO, Women's Aid; John Twomey, Deputy Commissioner, An Garda Síochána; Geraldine Fitzpatrick BL; and, Tessa Collins, Pavee Point.

Probate Bar Association launched

Pictured at the launch of the new Probate Bar Association of Ireland were (from left): Association members Catherine Duggan BL; Anne Marie Maher BL; Vinog Faughnan SC; and, Karl Dowling BL.

The Probate Bar Association of Ireland was established in July 2019 by Vinog Faughnan SC (Chair), Catherine Duggan BL (Vice Chair), Karl Dowling BL (Secretary), and Anne Marie Maher BL (Treasurer). The Association was officially launched by Ms Justice Mary Laffoy in July and is now open for membership. The first breakfast briefing was held on December 10, 2019, with Anne Marie Maher BL speaking on probate issues.

Access to justice

The Bar of Ireland recently held a CPD seminar on 'Access to Justice: Article 42A of the Constitution – what's changed since the Children's Referendum?'
Pictured at the seminar were (from left): Lewis J. Mooney BL, 2018-2019 Catherine McGuinness fellow; Judge Catherine McGuinness; and, Tríona Jacob BL, 2019-2020 Catherine McGuinness fellow.

Ireland's opportunity

The Bar Review spoke to former Taoiseach John Bruton, Chair of the new Implementation Group for the promotion of Irish legal services post Brexit.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Brexit poses any number of challenges to Ireland and the Irish economy, and while at the time of going to press, yet another extension has been granted to the UK Government, and no further developments are likely until after the December 12 general election, preparations continue across all sectors for whatever the impact – deal or no deal – may be. The legal profession is no exception, and has in fact proposed that there are significant opportunities in promoting Ireland globally as a leading centre for international legal services post Brexit.

After a lengthy process of consultation, The Bar of Ireland, the Law Society and the wider legal community presented a proposal to Government on how these benefits might be realised, and in January 2018 the Minister for Justice, Charlie Flanagan TD, formally announced the Government's support of the initiative.

Getting started

An Implementation Group has now been established to bring these proposals to fruition. The group is made up of representatives from the legal profession, Government, the IDA, and others (see panel), and former Taoiseach and European Union Ambassador to the United States John Bruton has been appointed as Chairperson. The Group met for the first time in October 2019, and John Bruton says it was an opportunity for the members to get a sense of what is envisaged by the project, and what needs to be done: "We had a presentation from The Bar of Ireland, which identified a number of areas of opportunity. One of these would be in ensuring the enforceability of judgments, because non-EU states don't have the capacity to enforce judgments in the EU in the same way. Another would be persuading people who are writing new contracts to write them in the law of an EU state, i.e., Ireland, rather than in the law of a non-EU state, i.e., the UK. Guaranteeing the right of appeal to the Court of Justice of the European Union in the event of disputes would be another area, and also emphasising the effectiveness of the Commercial Court in Ireland, which I think is seen as one of the big positive achievements of the reforms in the court system in recent times".

He makes the interesting point that legal education has moved on in the three and a half years since the Brexit referendum, and the way in which lawyers are trained inside and outside the EU is now also a significant factor: "There are a lot of young people in the profession and they have been trained in EU law, whereas it is the case that fewer and fewer UK lawyers are being trained in EU law".

The Group has identified a number of areas where advances might be made, such as aviation law, finance law, banking, funds-related law, corporate bonds, insurance, and intellectual property. But they are also aware of a need to watch for opportunities that have not yet become apparent: "The things that we think may be advantageous may not be as advantageous as other things, so we need to keep an open mind".

The Group is also aware that a number of Irish-based law firms already have operations outside Ireland, and hopes to build on that intellectual capital to support this initiative.

Government support

The Government's support is obviously vital and very welcome; Government departments are strongly represented among the membership of the Implementation Group. John Bruton has experience of the importance of this from his time as Chair of the Irish Financial Services Centre: "One of the successes of the Irish Financial Services Centre was the existence of a clearing house group, where all the people directly involved were around the table. It was very heartening to see the high level of representation around the table [of the Implementation Group] from Government departments. We will be a place where concerns on the part of those who are practitioners can be raised and heard by Government, not just by the Department of Justice, by all the Government departments that might have anything to say about it. I think that is a very important advantage for the legal profession, that there will be a place where one can get ideas and concerns across to the entirety of Government in one place, in one meeting, in one hour".

Action plan

The Group's next task is to draw up an action plan for its three-year term, which will set out a range of activities, such as setting up a website, and identifying international events that could be targeted to promote Ireland's legal skills.

John Bruton is aware, however, that they are not starting with a blank slate: "We're building on activity where the Attorney General and a number of members of the judiciary have already attended events in the United States. That sort of activity will now be supported and co-ordinated by the Group".

While this initiative is still at a relatively early stage, one task for the Group is to identify any barriers to its success: "Obviously for people who are making the decision to write contracts in Irish law, or to make the Irish courts the place where issues would be arbitrated or judged, they will be looking at the efficiency and the costs of the Irish system. So anything that can enhance the effectiveness of the Irish legal system, investment in technology for example, in the right technology, would be very positive. That is of course a matter for Government and the Courts Service, but we would I think be taking an interest in it and passing on any concerns".

Legal interest

John Bruton's long and distinguished career in politics is well known, but what might be less well known is that he originally trained as a barrister, although he never practised, and this contributed to his decision to accept Minister Flanagan's invitation to chair the Implementation Group: "I have an interest in the law, some instinctual knowledge of it. I was asked by the Minister, and my natural reaction was positive".

He obviously brings a wealth of knowledge and experience to the role of Chairperson: "I have chaired Government successfully I think, and I led a parliamentary party for over ten years. You can get a sense of a meeting and where a consensus might be found or whether it's better to leave the issue over to the next meeting. I also have the capacity to convey things in the public media, at meetings, speeches and so on, which again was a skill I had to have in politics. Obviously I have five years' experience as an ambassador in the United States, and the United States is going to be one of the big markets for this initiative".

He retains a great respect for the values of the Irish legal profession, which he believes are also vital to this initiative and should be promoted just as strongly as any other qualification: "I know many members of the profession. I am an honorary Bencher of the King's Inns. Certainly in my training to be a barrister, the ethical considerations were impressed upon me – that it wasn't all about just making a good living, but that there were certain obligations, obviously to your client, but also to other barristers, to help new barristers find their way. It wasn't all about how well one was spending one's own time, or one's own income requirements. That certainly was what was inculcated when I was in training. I think that's important because certainly you see in other countries, notably the United States, a legal ethos that's rather more self-serving. I think that's something to be avoided and I think the social capital that's represented by an ethical profession is something that cannot be quantified, but is exceptionally important, and is one of the things that hopefully we will be able to showcase through this initiative – that the Irish profession, both solicitors and barristers, have a very strong ethical sense, and they're not just good lawyers".

He doesn't regret not practising, however: "It would have been because I had lost my seat in the Dáil if I had done so! I never thought about practising as well as being a TD; I felt that the role of representation in our system is so all-absorbing that one could not really pursue any other activity, and I think that was the right decision".

Brexit…

Given the purpose of the Implementation Group, and John Bruton's enormous political experience, it would be foolish to let the interview pass without asking his view on the current chaos in the British political system. At the time of our interview the general election had not yet been announced, but was looking likely, and he agrees that everything now hangs on its outcome. The electoral system in the UK is also, he says, a significant factor: "It's now going to be decided in a general election under an electoral system that is deeply imperfect, the UK straight vote system, which means that a party with 33 or 34% percent of the vote can in certain circumstances have an overall majority. Britain doesn't have a proportional system. It doesn't have a culture of coalitions, although the Conservative/Lib Dem coalition was relatively successful. That's going to be a problem. Literally anything could happen. This will be 600 different elections, with the voters in each different constituency having to make a tactical decision depending on which side of the argument they support on EU matters".

As to his own view on what will happen: "I don't know. I think if you have any form of coalition you'll probably have a referendum. If you have a single party government you'll probably have Brexit. Those who want to stay in the EU should be hoping for a hung parliament".

In the meantime, it's hard not to feel that there has been a lack of awareness, to say the least, in certain quarters in the UK, as to the impact of leaving the EU. This initiative on the part of the legal professions is an example of that possible fallout: "I think an initiative like this, to the extent that it gets any notice [in the UK], reminds people that there are costs to Brexit. And I think the problem in Britain over the last three and a half years is that they have never really faced up to the costs".

Implementation Group members	
The Bar of Ireland	Patrick Leonard SC Paul McGarry SC
The Law Society of Ireland	Michelle O'Boyle, President Liam Kennedy, A&L Goodbody
IDA Ireland	David Nolan, Senior Vice President Eleanor Treanor (alternate)
Attorney General	Séamus Woulfe SC
Department of An Taoiseach	John Shaw, Assistant Secretary General
Department of Justice and Equality	Oonagh Buckley, Deputy Secretary General
Department of Public Expenditure & Reform	Ronnie Downes, Assistant Secretary General
Department of Finance	Karen Cullen, Head of International Financial Services, Risk and Management
Department of Foreign Affairs and Trade	Michael Lonergan, Deputy Head of Mission
Department of Business, Enterprise and Innovation	Brian Walsh, Deputy Head of Inward Investment and North-South Unit Richard Scannell, Head of the Unit (alternate)

Lucky man

Tomi Reichental, recipient of the 2019 Bar of Ireland Human Rights Award, is a concentration camp survivor who dedicates his life to educating young people about the Holocaust, and sharing a message of tolerance and reconciliation.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

How does one describe the indescribable? How does one tell a story that is utterly unbelievable, and yet is entirely true? These are the tasks that Tomi Reichental has taken on for over a decade now, as he travels to schools all over Ireland and abroad to talk about his experiences in Bergen-Belsen concentration camp, and the lessons that must be learned from the Holocaust.

Tomi was born in Piestany in Slovakia in 1935. Slovakia was not occupied by the Nazis at first; however, the puppet government was sympathetic to Nazi ideology, and deportation of Jews began in early 1942. Over a six-month period, approximately 58,000 Jews were deported from Slovakia, mainly to the gas chambers of Auschwitz, including 30 members of Tomi's extended family. In 1944 an uprising in Slovakia finally brought the Gestapo to the country, and Tomi's family went into hiding. His father stayed behind on the family farm, but was arrested. Miraculously, he escaped from the transport that would have taken him to Auschwitz, and spent the war fighting with the partisans, but all Tomi and his family had was a card received shortly before their own capture, which said "I'm alive. Don't worry".

When the Gestapo finally came for the rest of Tomi's family, 13 of them were taken on the same day and brought to the Sered detention camp. Here, the "selection" took place: "It was very cruel – separating the families, the husband from the wife, the children from the father. Seven went to the right side, and six of us, my grandmother, one of my aunts, one of my cousins, my mother, my brother and myself, to the left. The people on the right side went to Buchenwald and Sachsenhausen. When we said goodbye to them we had no time to put our arms around them. We just waved and said 'when it's all over, we will be reunited'. But we never saw them again".

"The people on the right side went to Buchenwald and Sachsenhausen. When we said goodbye to them we had no time to put our arms around them. We just waved and said 'when it's all over, we will be reunited'. But we never saw them again."

Sitting in Tomi's comfortable and welcoming home in Dublin, he speaks calmly and without embellishment of the seven-day journey by cattle train to Bergen-Belsen: "One moment we were standing before the carriage as civilised people, fed and clothed. The next moment the door closed behind us and we were no longer civilised people – we were like animals. We had no hygiene because the water we had was drinking water. The stench became unbearable. On the seventh night, the door opened and there were SS soldiers with weapons and Alsatian dogs, shouting. We were taken on a march through a forest that lasted about two and a half hours. On the horizon suddenly we saw this chimney, with a glow of fire coming out. You can imagine what the adults among us were thinking. The children, we didn't know, but they knew already about the gas chambers. They thought that was where we were going. I remember only when my mother squeezed myself and my brother, because what went through her mind must have been just terrible".

Hell on earth

Tomi often talks about the fact that he and his brother had been protected from the terrible knowledge of what was happening in the camps, but there was no protecting them from a place where those horrors were before their eyes day and night. Bergen-Belsen had no gas chambers, but cold and starvation, with the inevitable illness and disease, meant that over 70,000

people died there. Tomi's own words tell the story best: "The only word for it is a hell on earth. This is something that you couldn't imagine. When we came to our part of the camp we didn't even know if we were in the women's camp or the men's camp because you saw these skeletons, shaved heads, in the striped uniform; you couldn't see any attribute, if they were women or men. So only after several days we discovered that we were in the women's camp. As children we used to play outside and these women used to walk around and they were just skeletons, walking very slowly; they were mortally sick. Occasionally they would fall down. We would stop playing and watch: 'will she get up or no?' Because we knew if she gets up she has another day to live. But in most cases she never got up. We saw people dying in front of our eyes.

"One moment we were standing before the carriage as civilised people, fed and clothed. The next moment the door closed behind us and we were no longer civilised people – we were like animals."

"Our day started with roll call, which was in freezing cold. We didn't have warm clothes. The temperature would drop to minus 15 or 20. We had to stand there for an hour till our supervisor came. These [supervisors] were young women in their twenties. They went according to the proverb that if you show compassion it's a sign of weakness, so they exercised their brutality all the time. We were not allowed to talk directly to these women. One of the women [prisoners] got very annoyed and approached this SS woman. We had to stand around as she beat her and beat her until she fell down. I don't know if she survived. But we had to be witness to it as an example that if you do something out of the ordinary, this is what you have to expect".

The abuse and indignity did not end with death: "There were men with a cart with two wheels and they would go to each hut and ask them if anybody died during the night. They would pick the corpse up and throw it on the cart. Once the cart was full it would be brought to the mortuary, and then in the evening to the crematorium. Constantly you smelled the burning of flesh. But we got used to it. We eventually didn't even smell it".

The inmates in the camps, while they were predominantly Jews, came from many backgrounds: "There were not only Jewish people; there were gypsies, Jehovah's Witnesses, gay and lesbian people, German political prisoners, and they were not treated any better".

The toll of this suffering and brutality cannot be measured. While Tomi believes that his age protected him to some extent from the worst psychological trauma, others in the camp were driven to terrible extremes: "In the night, they would climb the perimeter. Of course the guard – every 300 metres was a watchtower – would shoot them. We used to hear the shots being fired during the night and in the morning we would see the corpses on the barbed wire. These women didn't want to escape. They couldn't escape, but they just wanted to end it. This used to happen every day, all over the camp".

Bergen-Belsen was liberated in April 1945, but one month before, Tomi's family experienced further tragedy: "When I woke up I saw my mother and my aunt crying, and they told me that my grandmother had passed away. That morning we sat on the bed, five of us, and two men entered the room, they picked up my grandmother. They stripped her – she was just like a little baby. One picked her up by the hands, one by the legs. She was thrown onto the cart, then wheeled outside and thrown on the pile of corpses. We sat there for a couple of minutes. Nobody cried because we didn't have any tears anymore".

Tomi says that on April 15 every year, the anniversary of their liberation, "I take a glass of wine and I say 'Aleichem'".

On the morning of our interview, Tomi had given a radio interview where he was asked, as he often is, how he answers those who deny that the Holocaust happened at all. For the first time in this measured retelling, he becomes exercised: "The Holocaust did happen. I was there. I saw the corpses. And it did happen. People must know that it's the truth".

"I made peace with my past so it doesn't spoil my present. When people ask me about hatred, I say I have no hatred because hatred is a type of trauma. So I put it behind me. I'm looking forward, not backward. I'm a happy person. I'm very lucky."

Building a future and facing the past

The surviving members of Tomi's family were finally released from the camp, and were reunited with his father. They travelled back to Slovakia, but by then the Eastern Bloc countries were in the grip of Communism, and Jews were no more welcome than they had been before: "We considered ourselves Slovak, but [to the Slovak population] we were Jews first and then we were Slovak".

The family eventually made the decision to emigrate to the newly formed state of Israel, and settled there in 1949. Seven years later, 21-year-old Tomi made the extraordinary decision to travel to Germany to study. I ask him how he could have considered returning to a place that had such horrendous associations, and he smiles:

Tomi lives in Dublin with his partner Joyce, who is a source of tremendous support to him in his work. He has spoken to over 120,000 schoolchildren in Ireland, and has travelled to South Africa, the US, and all over Europe, including Germany and Slovakia. In June 2015, on his 80th birthday, he gave a speech at the Blanchardstown Mosque. He gave a TedX talk in Trinity College Dublin in March 2018, and has addressed the Harvard University Law School and the Cambridge Union. He is the recipient of numerous awards for his work, including the Order of Merit of the Federal Republic of Germany, and honorary degrees from TCD, DCU and Maynooth University. His autobiography, *I was a Boy in Belsen*, was published by O'Brien Press in 2011, and a children's book, *Tomi*, was published in 2018. Tomi has also featured in a series of three documentary films – *I was a Boy in Belsen*, *Close to Evil*, and *Condemned to Remember* – which follow him as he confronts his past, and seeks to address the rise of the far right in Europe and beyond.

"You know, after the war the Germans were very helpful to Israel. When people were saying to me how can you go to Germany, I said I will tell you how: when Ben-Gurion [the Israeli Prime Minister] is going on an official visit, he has side riders on motorbikes, and the motorbike is BMW, made in Germany, and if Ben-Gurion agrees that German motorbikes can accompany him, I can go to Germany to study, because I wanted to study engineering and of course the Germans were the people to go to".

From Germany he travelled to Ireland in 1959, when he was employed by a German industrialist to set up a factory in Dublin. For over forty years he made a happy life here, married, raised a family and ran his business. But in all of that time, he never once spoke about what had happened to him. His wife died in 2003 without ever knowing Tomi's history.

It was only when he retired that Tomi began to write about what had happened. His articles attracted some media attention, and he was approached by the Holocaust Education Trust Ireland, who asked him if he would speak to school groups. A first he refused: "I couldn't do it, but eventually I realised that I owe it to the victims that their memory is not forgotten. I have to speak".

Thus began a new chapter in Tomi's life, speaking to schools, colleges, governments and organisations, telling his story, and explaining its meaning and message to generations for whom this is just another history lesson: "The teachers tell me 'Tomi, if you speak to them they will remember'. Not only do they remember, they come home, they tell their parents, they tell their friends. So it's not only the 200, 300 that know my story. There's a thousand others".

At first the process was incredibly difficult, as the act of telling not only brought back memories, but also forced him to see what he had suffered as a child through an adult's eyes: "Each time I was speaking I was reliving my past. I was talking about the time we had to wear a yellow star, and I had a yellow star and I put it on. Suddenly I broke down. When I was told to wear the yellow star, I didn't even ask why, I just wore it. It didn't mean anything to me; I was only nine years old. Now I felt the humiliation, and that humiliation made me cry. But now you know I'm more used to it. It's a job that I think is very important that I have to do".

Tomi's attitude to what he has suffered is one of extraordinary tolerance and strength: "I made peace with my past so it doesn't spoil my present. When people ask me about hatred, I say I have no hatred because hatred is a type of trauma. If you carry hatred you suffer, and the person that you are hating, he doesn't give a damn anyway. So I put it behind me. I'm looking forward, not backward. I'm a happy person. I'm very lucky".

"The Holocaust did not start with the gas chamber. The Holocaust started with whispers, and then abuse and finally murder. We have to stop it at the time of the whisper, because if we don't, it might be too late".

Dangerous times

Tomi's message is more important than ever now, as the growing international migrant crisis, and the rise of right-wing political groupings, require an urgent response from governments and society as a whole. In Ireland, protests at proposed Direct Provision centres, and racial abuse on social media, have received extensive media attention, and Tomi is angered and bewildered that the message of the Holocaust has to be relearned, generation upon generation. The number of Jewish refugees accepted into Ireland during and after World War II was pitifully low, and he says our approach to refugees now is no different: "Of course I criticise that Ireland doesn't take more refugees. This is history repeating itself, you know? Today there are different people, tomorrow it might be you".

Naturally, he supports the campaign for stronger hate crime legislation, citing Germany as an example, where Holocaust denial is a crime. With a general election almost certain in 2020, he asks that people raise this issue on the doorsteps: "We talk about what individuals can do and what governments can do. We need to say to people if they canvass us on the doors: 'we need hate crime legislation: what would your party do?'

"I always say you know here in Ireland, we are a democratic country. You have a voice and when you are exercising it, think about it very carefully".

He believes in our power as individuals to counter racism, abuse and discrimination in our day-to-day lives, and this is also a message he brings to the children and young people he speaks to: "If you see something like this – bullying because they are foreign or because they have different colour skin or because they are a different religion, don't become a bystander. Stand up to these bullies and if they don't stop, go to the teacher, go to the police. This has to stop. We can't let it go. "The Holocaust did not start with the gas chamber. The Holocaust started with whispers, and then abuse and finally murder. We have to stop it at the time of the whisper, because if we don't, it might be too late".

LEGAL UPDATE

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Equitable beef pricing bill 2019 – Bill 79/2019 [pmb] – Peadar Tóibín
Family law bill 2019 – Bill 78/2019
Health and childcare support (miscellaneous provisions) bill 2019 – Bill 76/2019
Health (medical entitlements in nursing homes) (miscellaneous provisions) bill 2019 – Bill 73/2019 [pmb] – Deputy Imelda Munster and Deputy Caoimhghín Ó Caoláin
Housing (homeless housing assistance payment) (amendment) bill 2019 – Bill 84/2019 [pmb] – Deputy Frank O'Rourke
Industrial development (amendment) bill 2019 – Bill 77/2019
Intoxicating liquor (amendment) bill 2019 – Bill 70/2019 [pmb] – Deputy Kevin O'Keeffe
Latent defects redress bill 2019 – Bill 87/2019 [pmb] – Deputy Eoin Ó Broin and Deputy Dessie Ellis
Mandatory beef price transparency bill 2019 – Bill 85/2019 [pmb] – Deputy Brian Stanley
Noise pollution (management and abatement) bill 2019 – Bill 74/2019 [pmb] – Deputy Thomas P. Broughan
Planning and development (amendment) (first-time buyers) bill 2019 – Bill 86/2019 [pmb] – Deputy Darragh O'Brien
Planning and development (ministerial power repeal) bill 2019 – Bill 69/2019 [pmb] – Deputy Eoin Ó Broin
Road traffic (amendment) (use of electric scooters) bill 2019 – Deputy 72/2019 [pmb] – Deputy Marc MacSharry
Thirty-ninth amendment of the Constitution (presidential elections) bill 2019 – Bill 68/2019

Bills initiated in Seanad Éireann during the period September 28, 2019, to November 7, 2019

Education (student and parent charter) bill 2019 – Bill 67/2019
Harmful plastics (prohibition) bill 2019 – Bill 83/2019 [pmb] – Senator Lorraine Clifford-Lee, Senator Robbie Gallagher and Senator Jennifer Murnane O'Connor
Housing (housing assistance payment waiting times) (miscellaneous provisions) (amendment) bill 2019 – Bill 80/2019 [pmb] – Senator Jennifer Murnane O'Connor, Senator Lorraine Clifford-Lee and Senator Catherine Ardagh
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Parent's leave and benefit bill 2019 – Bill 75/2019
Road traffic (amendment) bill 2019 – Bill 71/2019 [pmb] – Deputy Frank Feighan, Deputy Martin Conway and Deputy Catherine Noone

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Child care (amendment) bill 2019 – Bill 66/2019 – Committee Stage
Consumer protection (gift vouchers) bill 2018 – Bill 142/2018 – Committee Stage
Family law bill 2019 – Bill 78/2019 – Committee Stage
Finance (tax appeals and prospectus regulation) bill 2019 – Bill 45/2019 – Committee Stage
Health and childcare support (miscellaneous provisions) bill 2019 – Bill 76/2019 – Committee Stage
Industrial development (amendment) bill 2019 – Bill 77/2019 – Committee Stage – Passed by Dáil Éireann
Landlord and tenant (ground rents) (amendment) Bill 2017 – Bill 116/2017 – Committee Stage
Parent's leave and benefit bill 2019 – Bill 75/2019 – Committee Stage
Regulated professions (health and social care) (amendment) bill 2019 – Bill

13/2019 – Committee Stage – Report Stage
Social welfare bill 2019 – Bill 51/2019 – Committee Stage

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Education (student and parent charter) bill 2019 – Bill 67/2019 – Committee Stage
Health and childcare support (miscellaneous provisions) bill 2019 – Bill 76/2019 – Committee Stage
Social welfare bill 2019 – Bill 51/2019 – Committee Stage – Report Stage – Passed by Seanad Éireann
Traveller culture and history in education bill 2018 – Bill 71/2018 – Report Stage – Passed by Seanad Éireann

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

Bills and legislation
www.oireachtas.ie/parliament/

www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

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

Barrister fees and Section 150 notices

A newly commenced section of the Legal Services Regulation Act 2015 has significantly changed many factors around how legal practitioners deal with costs.

Derry Hand BL

Introduction

Part 10 of the Legal Services Regulation Act 2015 (LSRA) was commenced on October 7, 2019[1] and sets out the new regime in respect of legal costs in this jurisdiction including, *inter alia*, the establishment of the Office of the Legal Costs Adjudicator, a revised system for the adjudication of legal costs, and rules governing the provision of bills of costs.[2] It is important for members of the Bar to familiarise themselves with the provisions of Part 10 and the new Rules of the Superior Courts, which revise and update Order 99. This article primarily focuses on Section 150 of the LSRA, which significantly increases the responsibility on practitioners to keep their clients updated with accurate information in relation to legal costs. A key change is that a failure to comply with Section 150 could limit the recovery of fees when the matter goes to taxation.

It is important to note that these new requirements under the LSRA will apply to both solicitors and barristers.[3] While in practice, solicitors frequently requested fee estimates from barristers, there was no express statutory requirement on barristers to provide costs information to their clients and in this regard, Section 150 represents a significant change for our profession.[4]

Section 68 of the Solicitors (Amendment) Act 1994

Before looking at the new requirements under Section 150, it is worth taking a brief look at the rules that were previously in place for solicitors regarding the provision of information in relation to legal costs to illustrate the changes brought about by Section 150. Section 68 of the Solicitors (Amendment) Act 1994 provides as follows:

> "(1) On the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, a solicitor shall provide the client with particulars in writing of –
>
> (a) the actual charges, or
> (b) where the provision of particulars of the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges, or
> (c) where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made, by that solicitor or his firm for the provision of such legal services…"

Where the legal services which the solicitor was to provide involved contentious business (i.e., litigation), there was also an additional requirement that the solicitor provide particulars in writing of: (1) the circumstances in which the client may be required to pay costs to any other party; and, (2) the circumstances in which the client will be liable to discharge his or her solicitor's costs in the event that the full amount of the costs are not recovered from the opposing party on party and party taxation.

In practice, many litigation solicitors tended to confine the Section 68 letter to setting out the basis on which the charges were to be made in accordance with Section 68(c), which permitted a solicitor to state in relatively general terms that the charges would be measured having regard to factors such as the skill and specialised knowledge of the solicitor, the time and labour expended, the complexity and difficulty of the issues raised, the importance of the case, and the responsibility resting on the solicitor.[5]

The case law on Section 68 establishes that a failure to comply with the provision does not necessarily result in any loss or diminution in the costs that

might be recovered from a client. In *A&L Goodbody v Colthurst*,[6] Peart J. held that Section 68 was not intended to deprive a solicitor who has failed to send a Section 68 letter of his right to recover his costs when taxed, despite the fact that the section is worded in mandatory terms. The absence of a Section 68 letter is something the Taxing Master may take into account when deciding upon the appropriateness of the fees, if such fees are in excess of what the Taxing Master considers appropriate in the absence of prior notification. In addition, he also commented that it was clear that a failure to comply is a regulatory matter for the Law Society to consider, which may result in a censure or fine. He concluded that Section 68 was not intended to replace the statutory role of the Taxing Master and that the client's right to have his costs taxed is the ultimate protection available.[7]

Similar to Section 68, the new Act requires that upon receiving instructions from a client, solicitors and barristers must provide a notice to the client, which discloses the legal costs that will be incurred in the matter concerned or, where not reasonably practicable to do so at that time, sets out the basis upon which the costs are to be calculated.

Section 150 notices

The requirements of Section 150 of the 2015 Act represent a fairly significant development of the law beyond what is currently required by Section 68. Similar to Section 68, the new Act requires that upon receiving instructions from a client, solicitors and barristers must provide a notice to the client, which discloses the legal costs that will be incurred in the matter concerned or, where not reasonably practicable to do so at that time, sets out the basis upon which the costs are to be calculated.[8] However, the LSRA goes further than Section 68 and requires legal practitioners, as soon as reasonably practicable, to provide the client with a notice that discloses the legal costs that will be incurred.[9] The relevant portion of Section 150 provides:

"(1) A legal practitioner shall, whenever required to do so under this section, provide to his or her client a notice (in this section referred to as a "notice") written in clear language that is likely to be easily understood by the client and that otherwise complies with this section.

(2) On receiving instructions from a client, a legal practitioner shall provide the client with a notice which shall—

(a) disclose the legal costs that will be incurred in relation to the matter concerned,

or

(b) if it is not reasonably practicable for the notice to disclose the legal costs at that time, set out the basis on which the legal costs are to be calculated.

(3) Where subsection (2)(b) applies, the legal practitioner concerned shall, as soon as may be after it becomes practicable to do so, provide to the client a notice containing the information specified in subsection (2)(a)".

It would appear therefore that, where a legal practitioner initially sets out the basis on which the legal costs are to be calculated (which is likely to be the norm for litigation matters), a minimum of two Section 150 notices will be required.

How legal costs are calculated under Section 150

Section 150 notices are intended to be longer and contain more information than Section 68 letters. The information must be written in clear language that is likely to be easily understood by the client.[10] Section 150(4) sets out the information which must be contained in the legal costs notice and it is worth examining these provisions in detail. Each Section 150 notice is required to specify legal costs information to the client under three headings, unless it is not reasonably practicable to do so. These are legal costs:

a. certified by the legal practitioner as having been incurred as at the date of the notice;
b. certified by the legal practitioner to be of a fixed nature or certain to be incurred (or if it would be impracticable for the legal practitioner to so certify, the basis on which they are to be charged); and,
c. insofar as practicable, certified by the legal practitioner to be likely to be incurred.[11]

Where not reasonably practicable to disclose the legal costs specified above at the time of the notice, a legal practitioner must set out the basis on which the costs are to be calculated.[12] Section 150(4)(c) provides that a notice must set out the basis on which the amounts were or are to be calculated, explained by reference to the matters set out in paragraph 2 of Schedule 1 of the LSRA. Schedule 1 incorporates and expands upon the factors set out in Order 99 Rule 37(22)(ii), e.g., the complexity and novelty of the work; the skill and specialised knowledge of the practitioner; the time and labour expended; the number, importance and complexity of documents drafted and/or examined; the amount of money or the value of the property involved, etc.[13] The notice must also contain a statement of the practitioner's obligation under Section 150(5) (addressed below).

In addition to the above, Section 150 notices in relation to matters involving litigation[14] must also set out the following:

d. an outline of the work to be done in respect of each stage of the litigation process and the costs or likely costs or basis of costs involved in respect of each such stage, including the likelihood of engaging a practising barrister, expert witness or providers of other services;
e. a statement of the legal practitioner's obligation under Section 150(6) to ascertain the likely costs or basis of cost of engaging a practising barrister, expert witness or provider of any other service, provide this information to the client and satisfy himself or herself as to the client's approval of the engaging of the person;
f. information as to the likely legal and financial consequences of the client's withdrawal from the litigation and its discontinuance; and,
g. information as to the circumstances in which the client would be likely to be required to pay the costs of one or more other parties to the litigation, and information as to the circumstances in which it would be likely that the costs of the legal practitioner would not be fully recovered from other parties to the litigation.

Clearly, some of these factors are more relevant to solicitors than barristers, such as the obligations in relation to the engagement of expert witnesses. Where a client requires any clarification with respect to a Section 150 notice, Section 150(9) obliges a legal practitioner to provide such clarification as soon as is reasonably practicable after having been requested to do so by a client.

Obligation to update Section 150 notices

Section 150(5) also places an ongoing requirement upon barristers and solicitors to update the client on legal costs as the litigation progresses. If a practitioner becomes aware of a factor which would be likely to make the legal costs incurred significantly greater than those indicated in a Section 150 notice, he or she is required to provide the client with a new notice as soon as he or she becomes aware of that factor. It remains to be seen how this obligation will be interpreted in the context of litigation. A practitioner's obligations could potentially be quite extensive in this regard, given the inherent unpredictability of adversarial proceedings and the fact that the course of the proceedings and the costs involved are frequently determined by the approach taken by the opposing party.

Period of suspension of legal services

A Section 150 notice must provide for a suspension period after the Section 150 notice is given during which the legal practitioner is not to provide legal services.[15] This provision appears to operate in a similar manner to other 'cooling-off' periods in consumer legislation. The suspension of legal services remains in place pending either:

a. receipt of confirmation from the client that they wish to instruct the legal practitioner to continue to provide legal services in the matter; or,
b. the expiry date of the suspension period.

A section 150 notice must provide for a suspension period after the Section 150 notice is given during which the legal practitioner is not to provide legal services. This provision seems to operate in a similar manner to other 'cooling off' periods in consumer legislation.

There is no formal or specific form of confirmation specified, or even a requirement that it be in writing. The suspension period specified must not be longer than 10 working days. No minimum period of time for the suspension of services is specified in the LSRA. It would appear that what constitutes a reasonable period for the suspension of services will vary depending on the circumstances of the case. Barristers and solicitors will be obliged to exercise their discretion in determining what is reasonable in the particular circumstances. The suspension period applies not just to the first Section 150 notice issued by the solicitor and barrister, but also to every subsequent Section 150 notice. It is important to note that the LSRA provides that, notwithstanding the cooling off or suspension period, a legal practitioner "shall" provide legal services in what might be deemed matters of urgency.[16] These matters include circumstances where:

a. in the professional opinion of the legal practitioner, not to provide those legal services would constitute a contravention of a statutory requirement or the rules of court, or would prejudice the rights of the client in a manner that could not later be remedied – a good example of where this provision would come into play is where a case is about to become statute barred;
b. a court orders the legal practitioner to provide legal services to the client; or,
c. a notice of trial has been served in relation to the matter or a date has been fixed for the hearing of the matter concerned.

Barristers

Under Section 150(10), a barrister's obligation to provide a Section 150 notice is fulfilled when the barrister provides the Section 150 notice to the solicitor, who is required to immediately furnish same to the client. A duty owed by the barrister under Sections 150(6), (7) and (9) to his or her client shall be construed as a duty owed by the barrister to the solicitor. Where he or she considers it appropriate or where there is a request by the client, the solicitor shall request clarification of a Section 150 notice from the barrister and immediately provide clarification to the client.

Consequences for a failure to comply with Section 150

One of the crucial differences between the regime under Section 68 and the new regime under Section 150 is the consequences for failure to comply. There are a number of significant consequences under Section 150 if a practitioner fails to implement the new requirements. Where a bill of costs is being adjudicated by a legal costs adjudicator (LCA), the LCA does not have the authority to confirm a charge in respect of a matter or item if the matter or item has not been included in a Section 150 notice, unless the LCA is of the opinion that to disallow the matter or item would create an injustice between the parties.[17] This appears to be a significant shift in emphasis, as it would appear that any costs that are not included or fall outside the terms of the Section 150 notice must be disallowed, unless the practitioner involved can persuade the LCA that to do so would be unjust. It will be interesting to see how this requirement will be interpreted by the new LCAs appointed under the Act. Given that one of the purposes of the new provisions is to provide greater protections for clients and transparency in legal costs, it may well be that an argument that a practitioner will not be remunerated for work that he or she has done would not be sufficient on its own to constitute an injustice.

Failure to comply could also have potentially significant regulatory implications. An act or omission of a legal practitioner in relation to the Section 150 requirements may constitute misconduct where the act or omission consists of a breach of the LSRA or regulations made under it.[18] Sanctions will be determined by the Legal Services Regulatory Authority. An act or omission of a legal practitioner may constitute misconduct where the act or omission consists of seeking an amount of costs in respect of the provision of legal services which is grossly excessive.[19]

Agreement regarding legal costs

As an alternative to providing a Section 150 notice, a practitioner may enter into an agreement in writing with the client in relation to the amount and manner of payment of all or part of the legal costs payable by the client.[20] However, the legal costs agreement must contain all the particulars required by Section 150 if practitioners wish to avoid the need for a separate Section 150 notice. A legal costs agreement provides clarity for the client in relation to the costs that will be incurred in a particular matter. There are also potential benefits for the practitioner, in particular in relation to enforceability. A legal costs agreement is amenable to adjudication by the LCA.

Conclusion

It is clear from the above that the obligations on barristers to provide information to their clients in relation to legal costs have been significantly increased. It is important that members familiarise themselves in detail with the new requirements, as otherwise they may be left counting the cost of non-compliance. The Council of The Bar of Ireland published a guidance for members in relation to Part 10 of the Act in November 2019, which is available under the Professional Practice Hub of the members' section of www.lawlibrary.ie.

References

1. S.I. No. 502/2019 – Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019.
2. Section 152.
3. Under Section 2 of the LSRA, "legal practitioner" means a person who is a practising solicitor or a practising barrister, and a reference to a solicitor includes a reference to a firm of solicitors.
4. However, it should be noted that the Council of The Bar of Ireland has previously issued guidance that fee estimates should be provided by members to clients.
5. These factors essentially mirror the criteria the Taxing Master must take into account under Order 99 Rule 37(22)(ii)(a) to (g) of the Rules of the Superior Courts when assessing an instructions fee.
6. [2003] IEHC 74.
7. See also *Boyne v Dublin Bus* [2008] 1 IR 92; *M v M* [2018] IECA 396.
8. Section 150(2). The obligation to send a Section 150 notice appears to apply even where, for example, a barrister is regularly retained and remunerated by reference to a scale of fees agreed with or set by the client.
9. Section 150(3).
10. Section 150(1).
11. Section 150(4)(a). A practitioner must also specify the amount of VAT to be charged in respect of the costs specified (Section 150(4)(b)).
12. Section 150(2)(b).
13. The additional factors specified in Schedule 1 that are not included in Order 99 Rule 37(22)(ii) include: research and investigative work undertaken by the legal practitioner; the use and costs of expert witnesses; and, any agreement to limit the liability of the legal practitioner pursuant to Section 48 of the LSRA.
14. Section 150(4)(e).
15. See Sections 150(4)(f), (7) and (8).
16. Section 150(8).
17. Section 157(6).
18. Section 50(m).
19. Section 50(l).
20. Section 151(1).

To refer or not to refer

Are solicitor referrals to a medical consultant a step too far for prudent practice?

Orla Kelly
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Recently, Barr J. adversely commented on the practice of solicitors sending clients for specialist assessment without a general practitioner (GP) referral, stating:

"I do not think that it is good practice for solicitors to take it upon themselves to decide that their client needs evaluation by a particular medical specialist. That is a medical question which should be decided upon by the GP, or by another specialist, who may refer the plaintiff to a different specialist for further investigation".[1]

Twomey J. made similar comments in dismissing a claim in May 2019:

"Contrary to what this Court would regard as the usual practice, of a GP referring a patient to a consultant, it was a solicitor, with no medical expertise, who referred [the plaintiffs] to a consultant for their alleged injuries in order to progress these claims. The fact that a solicitor, rather than someone with medical expertise, made these referrals led this Court to the unavoidable conclusion that there was no medical need for the referral of the plaintiffs to the consultant, but a legal need to support a claim for damages".[2]

These *obiter* remarks by two eminent judges would cause any plaintiff lawyer to sit up and take notice. It calls into question a regular, routine step undertaken by many plaintiff solicitors. These reports (if supportive) are then relied on by counsel in presenting the case.

What is the usual course of events?

Solicitor referrals can take place for any type of specialist assessment but a referral to a psychiatrist provides a useful illustration.

Before embarking on litigation, it is axiomatic that a solicitor takes instructions and explores the various injuries sustained by a plaintiff following, for example, a negligent medical procedure. During the course of this detailed attendance, a solicitor often finds themselves in the unique and privileged position whereby a client (or their accompanying family member) explains the huge impact the injury has had on their life. The injury may often include adverse effects on their mood, relationships, ability to sleep, concentration, etc. It is a solicitor's duty to probe a little deeper and explore with the client whether they have mentioned this to their GP or treating consultant. The answer usually elicits comments such as:

- "I mentioned my low mood in passing to my consultant but we didn't really go into it as it wasn't his/her area and I had more pressing symptoms."
- "I haven't been attending my GP since this incident. I am under the care of the consultants at the hospital. I have enough appointments."
- "I don't really talk to anyone about it I only mentioned it because you asked, but now that you ask, I am not myself. I have constant nightmares and flashbacks since it happened."
- "I would like to see a psychiatrist, counsellor or someone about what happened as I keep mulling it over, but I'm not able to work at the moment, thus I can't afford another added expense. I even avoid going to the GP as that is expensive."
- "I've lost faith in my GP and a lot of doctors since the negligence happened. I don't feel like they are on my side. My GP is part of the problem."

Where appropriate, a solicitor might then suggest that the client might benefit from a psychiatric assessment. One explains that if the psychiatrist thinks there is nothing wrong, then so be it: that would be good news and

it isn't included in the case. However, if something can be diagnosed and treatment recommended, then surely it is worth knowing. Furthermore, if (and only if) a recognisable psychiatric injury caused due to the subject matter of the proceedings is diagnosed, then it will form a legitimate basis for part of the claim.

Until recently, this was common practice among Irish plaintiff solicitors. However, on the basis of Barr J.'s *obiter* remarks, that is not "good practice".

What do the Irish courts say?

The perceived stance of the Irish courts is based upon *obiter* comments by Barr J. and, more recently, Twomey J. The High Court case of *Dardis v Poplovka*[3] concerned a personal injuries claim arising out of a road traffic accident, which left Michael Dardis, a mechanical engineer, unable to work. The injuries and claim for loss of earnings were significant and therefore various medical professionals were involved. Understandably, the various views warranted close examination. It seemed that the plaintiff's solicitor referred the plaintiff for a specialist assessment. That specialist in turn referred the plaintiff onwards and, ultimately, the GP fell out of the loop and didn't receive the various updates by way of correspondence from the specialists that would be the norm.

However, this case was an oddity. The question marks about the referrals arose against the background of an uncertainty as to whether the plaintiff's solicitors in fact acted for the plaintiff and whether they should have been arranging any referrals at all:

"The plaintiff explained that he had never given instructions to Messrs. Hussey Fraser to act on his behalf in relation to the personal injury claim. There followed an amount of correspondence passing between the solicitors in relation to whether or not Messrs. Hussey Fraser had ever been instructed to act on behalf of the plaintiff in relation to his personal injury claim. … While this dispute between the plaintiff and his former solicitors is not directly relevant to the injuries sustained by him, it is an oddity in the case and is relevant to a point made later in this judgment concerning the practice of solicitors directly engaging consultants on behalf of a plaintiff".

Clearly a solicitor must have authority to act and should only make a referral to a specialist with the express authority of their client. Against the background of the above anomalous circumstances, Barr J. made the *obiter* comment that:

When a plaintiff is referred to a specialist by his solicitor, he does not become a treating doctor, but remains merely a reporting doctor. He will give an opinion as to the plaintiff's injuries and may recommend a possible line of treatment in respect of these. However, he will not communicate with the plaintiff's GP, but merely furnish a report to the solicitor.

"The court is of the view that it is inappropriate for solicitors to refer clients for specialist examination. There are two reasons for this. Firstly, normally, a plaintiff's GP plays a central role in relation to his rehabilitation. Often, the GP is the person who is first consulted by the plaintiff in relation to his injuries. He or she deals with the plaintiff on an ongoing basis. His primary aim is to make the plaintiff better. Accordingly, it is the GP who should decide when and to what specialist a patient should be referred. A plaintiff's case is much stronger if the decision to refer him to a specialist is made by the GP, rather than by the plaintiff's solicitor.

"The second reason why this is preferable is that if the plaintiff is referred by his GP to a specialist, that consultant becomes a treating doctor. This means that he assumes the responsibility of advising the plaintiff as to what treatment is best suited to make him better. He will decide what treatment is appropriate for the plaintiff and will oversee its implementation. If a given course of treatment is not successful in relieving the plaintiff's symptoms, he will advise what further treatment should be undertaken, or he will refer the plaintiff on to another specialist in a different field. As a treating doctor, he will also liaise with the plaintiff's GP and keep him updated as to the progress of treatment. In this way, there is continuity and communication between the various medical professionals, who are treating the plaintiff at any given time.

"When a plaintiff is referred to a specialist by his solicitor, he does not become a treating doctor, but remains merely a reporting doctor. He will give an opinion as to the plaintiff's injuries and may recommend a possible line of treatment in respect of these. However, he will not communicate with the plaintiff's GP, but merely furnish a report to the solicitor".

At any rate, in the end, the evidence of the plaintiff's experts was accepted.

As stated above, experience suggests that a client often does not deal with their GP on an ongoing basis, or at least does not mention all injuries. The first of the court's concerns is that the GP becomes somewhat out of the loop. This can be overcome by ensuring that when referring a client to a specialist, a solicitor requests that that specialist keeps the GP copied on all correspondence, recommendations and treatment plans (which should be the norm in any event). The second concern is that the specialist who gets the referral does not become the treating doctor. The specialist can become the treating doctor if they consider it appropriate and, in fact, clients often continue with the specialist in question (especially a psychiatrist) after the litigation has concluded. Lastly, as discussed below, it is discouraged (or even prohibited in certain jurisdictions) for a treating medical professional to act as a medical expert in their patient's proceedings.

In a separate case, Irvine J. gave judgment in the Court of Appeal case of *Fogarty v Cox.*[4]

Obiter, Irvine J. went on to caution "against a practice whereby any solicitor would repeatedly refer clients who have personal injury claims to the same doctor who would then take over the management of their care with a view to later coming to court to give evidence on their behalf. Those are circumstances likely to place the doctor in a conflict of interest situation and are likely to expose them to a risk of being considered less than fully independent when giving their evidence". Therefore, again, the courts cautioned, *obiter*, against solicitor referrals but did not rule them out, and indeed in this instance, the evidence of an independent expert (in the High Court), to whom the plaintiff had been referred by their solicitor, was accepted.

The 2018 case of *Flannery v Health Service Executive*[5] concerned an assessment of damages due to physical and psychiatric injuries sustained by a Mrs Ann-Marie Flannery when a swab was left inside her following the birth of her son. On that occasion, Barr J. did prefer the evidence of the defendant's expert psychiatrist and not the psychiatrist to whom the plaintiff had been referred by her solicitor. On that occasion, as always, the court had an opportunity to hear the evidence of the two independent, but differing, experts, and form its own view. Barr J. reiterated his view that "it is the GP who should refer the patient on for such evaluation".

What is the alternative view?

The decision of Barr J. deserves respect, but one wonders whether there is a different view that might be considered and equally given respect.

Obligation to explore all avenues

A solicitor has an obligation to investigate all potential legitimate avenues. If a client outlines factual symptoms that appear to amount to what might be a psychiatric injury (or other injury warranting further investigation, e.g., pain), are they professionally negligent not to consider that aspect of the claim? Perhaps.

Simply by referring a plaintiff to a psychiatrist for assessment and by exploring the possibility of psychiatric injury, it does not follow that a plaintiff will be entitled to damages for same. One is only entitled to damages if one has a recognised psychiatric injury, as found in the diagnostic manuals such as ICD-10 or DSM-V. The assessment of whether or not the injury falls within a psychiatric injury (and is thus compensatable) requires expert psychiatric evidence. Simply because nobody has referred a client for an assessment, does that mean solicitors (and counsel in their advices) should rely on someone else's judgement of a situation, confound the error and continue to neglect a client's difficulties? If a client describes symptoms such as low mood and depression, is it not remiss or even professionally negligent of a solicitor to not even refer the client and explore that avenue? A claim for psychiatric injury requires expert evidence and a specialist diagnosis. The specialist may well diagnose a psychiatric injury of a different variety or severity (as they are trained to do). If a plaintiff must rely on a GP who does not wish to refer them, is the plaintiff to be left with no psychiatric expert to counter a defendant's psychiatric expert?

Defendant solicitors routinely comment that expert psychiatric reports always support a psychiatric injury. Obviously, is the response! One cannot claim for psychiatric injury without a supportive expert report with a clinical diagnosis of a recognised psychiatric illness. It follows that defendant solicitors will probably never see an expert psychiatric report which concludes that the plaintiff does not have a psychiatric injury. Instead, defendant solicitors simply receive countless proceedings with no psychiatric element.

A solicitor has an obligation to investigate all potential legitimate avenues. If a client outlines factual symptoms that appear to amount to what might be a psychiatric injury, are they professionally negligent not to consider that aspect of the claim?

Role of the expert

The inference is that the court cannot trust these plaintiff-instructed experts. The inference is that there is an absence of independence because they were instructed by the solicitor as opposed to being referred by the GP and, consequently, that the expert report is somehow tainted. That same allegation of lack of independence could equally be made of the defendant experts. Such defendant experts are not retained following a GP referral. Rather, the referral is usually from a claims handler. The defendants are of course entitled to instruct their own independent experts to counter the plaintiff's experts (and they routinely do so from their own, often quite limited, pool of experts). It is for the experts to demonstrate and stand over their independent, evidence-based views in their reports and in cross-examination. Moreover, it is for the court to retain its role as the ultimate arbiter of the issues.

There is no doubt that the court must form a view as to whether it prefers the medical evidence adduced by the plaintiff or the defendant. The court's view may be influenced by whether or not a GP thought it necessary to refer a plaintiff to a specialist, but that is the height of it; it is merely a factor that might be taken into account depending on the circumstances. To go beyond that, or infer that there was no basis for a psychiatric injury (despite a plaintiff expert report which confirms otherwise) or to infer that the solicitor was

wrong to refer the client, is a step too far. The experts retained by the defendants will not have seen the plaintiff as a consequence of a GP referral. If the route by which a plaintiff comes to be assessed is a critical factor, then it is surprising that some degree of scepticism is not applied to the defendant expert.

Potential for plaintiff to have no expert

If a doctor must decide which specialist a client sees, who refers the plaintiff to the GP in the first instance? If the client does not attend their GP, are they stuck in a catch 22 situation whereby they cannot be referred to any specialist? What if the GP is a defendant in the proceedings? A treating specialist might be perfectly capable in their field, but not experienced or not agreeable to giving medicolegal evidence. They may have no knowledge of legal procedures. They may have a conflict of interest if they know, worked alongside or trained one of the defendants. If a treating consultant refuses or is unable to give evidence, then is the plaintiff stuck without any expert? One asks whether this imprimatur is confined to medical situations? These comments were made in the context of psychiatric injury but the sentiment was not confined to psychiatric referrals. It includes referral to all medical specialist assessment. By extending the logic of the comments, one could ask if this extends to other non-consultant experts? Should we refrain from referring cases for engineering inspections? Similarly, should we refrain from referring to other experts such as physiotherapists, speech and language therapists … the list goes on. The HSE may not have the resources to provide a service to an injured person, but does that mean that a solicitor can ignore that need? On the contrary, solicitors have an obligation to investigate and present a case in full. Solicitors therefore must refer a client, and obtain and present any expert evidence that suggests they would benefit from a treatment.

The UK and Australian view

Lastly, it may be helpful to consider the stance of other jurisdictions. It is interesting to note that this conflicts entirely with the comments of the Irish judiciary.

In the UK and Australia, treating doctors are prohibited from giving evidence. The UK rules require experts to be impartial, independent, and to understand that their duty is to the court to give an unbiased opinion.[6] Experts in Ireland have similar duties but the view in the UK and Australia is that a treating doctor is not unbiased. It is thus believed that there would be a conflict of interest in allowing a treating medical professional to give evidence in a case. The medical professional's duty is to their patient and a medical expert's duty is to the court. The two are not thought to be compatible.

There is a reasonable view that a treating doctor cannot give an entirely impartial view as to the patient's earlier condition before the referral to them, and to their likely prognosis. The treating doctor has a vested interest in the patient's outcome and their view could be coloured by a desire to overstate their influence ("they were terrible before I treated them, I've done/I'm doing a great job and they're going to be wonderful in the future thanks to me"). A known example is where treating orthopaedic surgeons stated that (based on their view) the client was doing as well as could be expected following a joint replacement; however, on referral to an independent orthopaedic surgeon, they were found to be symptomatic and a different treatment plan deemed necessary.

Others believe that giving evidence could have a damaging effect on the doctor–patient relationship. Many doctors, in particular a psychiatrist, will have a close relationship with their patients, which could be destroyed by their giving evidence and honest responses to questions about their patients.

Lawyers have a unique and privileged position wherein their clients come to them at a vulnerable time and trust them with their information. Solicitors have a professional duty to personally assess the particular situation and all relevant needs, to obtain all relevant independent expert evidence and, together with counsel, to build and present the best possible factual case for their client.

Conclusion

Lawyers have a unique and privileged position wherein their clients come to them at a vulnerable time and trust them with their information. Solicitors have a professional duty to personally assess the particular situation and all relevant needs, to obtain all relevant independent expert evidence and, together with counsel, to build and present the best possible factual case for their client.

Surely then, the court is more than capable of assessing the strengths and weaknesses of the evidence given by a particular specialist. It is perfectly proper for a court to consider the fact that the referral to the specialist was from a solicitor, as opposed to from a GP. However, it is respectfully suggested that it is a step too far to dismiss the evidence of a specialist expert, simply because the referral came from a solicitor. If GP referrals to a specialist are a necessary prerequisite before the evidence of a specialist is accepted, then the evidence of all defendant experts (retained by claims handlers) would be excluded. That would equally be unacceptable.

References

1. *Flannery, Ann-Marie v Health Service Executive* [2018] IEHC 127.
2. *O'Connell v Martin*; *Ali v Martin* [2019] IEHC 571.
3. [2017] IEHC 249 at 156-158.
4. [2017] IECA 309.
5. Infra at 1.
6. www.justice.gov.uk/courts/procedure-rules/civil/rules/part35#IDASLICC; www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35.

Judging personal injury awards

The Council of The Bar of Ireland welcomes the judiciary's role in implementing new personal injury awards guidelines.

Garrett Cooney BL
Chairman, Personal Injuries Committee

The following is a brief discussion of the origins, structure and functions of the Personal Injuries Guideline Committee (the Committee) and the likely effect it will have on personal injuries awards within this jurisdiction. The membership of the Committee, which has now been established, is made up of seven judges nominated by the Chief Justice: a judge of the Supreme Court; a judge of the Court of Appeal; two judges of the High Court; a judge of the Circuit Court; a judge of the District Court; and, at the discretion of the Chief Justice, a judge from either the Circuit Court or the District Court (see panel). The Chief Justice shall then appoint one of the judges nominated to the Board to act as chairperson of the Committee.

The Council of The Bar of Ireland welcomes this new initiative and the role of judges in setting the new guidelines. However, the Committee must be allowed to do its work untethered by outside interference.

Section 18 of the Judicial Council Act 2019 (the Act) establishes the Committee. The functions of the Committee, as per the legislation, shall be to prepare and submit to the Board of the Judicial Council (the Board) for its review:

(a) draft personal injuries guidelines in accordance with Section 90; and,
(b) draft amendments to the personal injuries' guidelines in accordance with that section.

Members of the Personal Injuries Guideline Committee, as appointed by the Chief Justice:

Ms Justice Mary Irvine, Judge of the Supreme Court (Chair)
Mr Justice Seamus Noonan (Court of Appeal)
Mr Justice Donald Binchy (High Court)
Mr Justice Senan Allen (High Court)
Ms Justice Jacqueline Linnane (Circuit Court)
Mr Justice Seán Ó Donnabháin (Circuit Court)
Judge Brian O'Shea (District Court)

The said Committee may from time to time review the personal injuries guidelines and shall review those guidelines within three years of the first guidelines being adopted by the Board.

The Committee will also have an ongoing role in the research into and the monitoring of the personal injury landscape. It has wide powers, including requiring any of the stakeholders to provide information it believes is necessary for it to complete its work.

It may also reasonably require for its purposes to: consult with such persons as the Committee considers appropriate, including the Personal Injuries Assessment Board (PIAB); and, conduct research on damages for personal injuries, including the level of damages awarded by courts in the State and by places outside the State, and settlements of claims for damages for personal injuries.

The Minister for Finance allocated €1m out of the latest Budget, in part, to fund the work of the Committee. This is a show of commitment from the current Government in assisting the Committee in progressing its mandate.

Review of litigation

The new legislation arises out of the review of personal injury litigation, and the level of awards arising therefrom, undertaken by the Personal Injuries Commission (the Commission), under the chairmanship of Mr Justice Nicholas Kearns, which published its final report in July 2018.

The Commission recommended that the Judicial Council should, when established, be requested by the Minister for Justice and Equality to compile guidelines for appropriate general damages for various types of personal injury. The Commission believes that the Judicial Council will, in compiling the guidelines, take account of the jurisprudence of the Court of Appeal, the results of the commission benchmarking exercise, the whiplash associated disorder (WAD) scale (as established by the Quebec task force), and any other factors it considers relevant.

The Judicial Council, in production of the new guidelines, may avail of assistance, as appropriate, from the PIAB and other relevant stakeholders. The Commission also recommended a review of the guidelines at regular intervals, for example, every three years. As a starting point, the Commission recommended the judicial recalibration of the existing Book of Quantum guidelines.

Capping awards

The Commission also notes that the Law Reform Commission has been requested to undertake a detailed analysis of the possibility of developing constitutionally sound legislation to limit or cap the amount of damages a court may award, and believes it is the appropriate body best equipped and resourced to undertake this study. This study is currently being undertaken and the results are likely to have a significant bearing on the shape of personal injury litigation in the future.

The said findings, as set out above, and the establishment of the Committee, have been welcomed by the Council of The Bar of Ireland. The Council agrees that the judiciary is the appropriate organ of the State to determine compensation for personal injuries.

Section 90 of the Act deals with the content of the guidelines and states that they:

"shall contain general guidelines as to the level of damages that may be awarded or assessed in respect of personal injuries and without prejudice to the generality of the foregoing, the guidelines may include guidance on the following:

a) the level of damages for personal injury generally;
b) the level of damages for a particular injury or a particular category of injury;
c) the range of damages to be considered for a particular injury or a particular category of injury; and,
d) where multiple injuries have been suffered by a person, the consideration to be given to the effect of those multiple injuries on the level of damages to be awarded in respect of that person".

The guidelines will, it seems, act in a similar way to the Book of Quantum – in that the court shall have regard to the guidelines and, where it departs from those guidelines, state the reasons for such departure in giving its decisions. Therefore, a judge still retains discretion when deciding the level of general damages to be awarded in a particular case. However, the Chief Justice recently commented that the new guidelines will be stronger than the existing ones.

The Commission recommended that the Judicial Council should, when established, be requested by the Minister for Justice and Equality to compile guidelines for appropriate general damages for various types of personal injury.

Amendment of Section 22 of the Civil Liability Act 2004

The introduction of the aforementioned legislation will have a significant bearing on the role of the PIAB, as it will no longer produce the Book of Quantum, but will offer assistance to the Committee in a consultancy capacity. Given the key role that the Committee will play in moulding the future of personal injury litigation, it is worth re-emphasising the importance of the independent function of the judiciary.

To that end, regard should be had to the doctrine of the separation of powers. Since the establishment of the State, the principles of the separation of powers have been fundamental to the success of Irish democracy. Doyle and Carolan state in their book *The Irish Constitution: Governance and Values* (at page 213):

"The theory of the separation of powers enjoys a position of almost unparalleled global repute as a foundational tenet of liberal democracy".
The doctrine instils a degree of independence between the three branches of Government and allows for the necessary checks and balances between them. This is vital in maintaining a fair and just society.

In attempting to ascertain what effect the new guidelines will have on the future landscape of personal injuries litigation, it is helpful to look at the present environment. Since the establishment of the Court of Appeal, there has been a significant recalibration downwards in the level of awards.

Impact of new guidelines

In attempting to ascertain what effect the new guidelines will have on the future landscape of personal injuries litigation, it is helpful to look at the present environment. Since the establishment of the Court of Appeal, there has been a significant recalibration downwards in the level of awards. The principles driving this downward trend have been set out in a number of recent judgements.
In *Nolan v Wirenski* [2016] IECA 56, Irvine J., when reducing the amount awarded for general damages by the High Court, stated that the Court should be: "(i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and, (iii) proportionate within the scheme of awards for personal injuries generally".
Irvine J. also determined that "minor injuries should attract appropriately modest general damages, middling injuries moderate damages, severe injuries significant damages…". This 'test' has been reaffirmed in a number of subsequent High Court and Court of Appeal decisions.
The above approach adopted by the courts, along with other factors, has resulted in the average personal injury award at High Court level dropping by 29% in 2018 (the figure appears to conflict with the view that the level of awards is the main factor behind the rise in public liability and other insurance premium levels).
Total awards made in the High Court in 2018 were €57.5 million, down from €85.3 million the previous year. These figures highlight the practical and fluid approach adopted by the courts in relation to the level of personal injury awards in attempting to strike a balance between the needs of the injured individual, who is entitled to compensation on the one hand, and the needs of a modern and buoyant society on the other.
These statistics provide further evidence that judges are the correct persons to be tasked with formulating the new guidelines. The guidelines should provide greater certainty as to the level of personal injury awards, in turn benefitting society as a whole with the long-awaited reduction in insurance premiums.
In conclusion, the Council of The Bar of Ireland welcomes Section 18 of the Judicial Council Act 2018 and the role of the judiciary in implementing the new guidelines.

President Richard Johnson

Richard Parnell Fitzgibbon Johnson was born on October 27, 1937. Each of his names was important: Richard a nd Johnson after his father from Rathkeale, Fitzgibbon from his grandmother, and Parnell because he, like his father, was and remained a Parnellite. Ricky, as he was always known, was the youngest of four siblings born into a politically divided family. His mother Annie Shortis was, and remained firmly, on the Republican side, and his father was appointed a district judge at a young age by Kevin O'Higgins during the Civil War, and served in Co. Kerry from 1922 until his retirement in 1965. Once, the elder Judge Johnson was obliged to take a trawler from Tralee to his court in south Kerry in order to avoid an ambush by the Irregulars, who had intended to murder him.

Independence, integrity, humanity and radicalism

Ricky learnt from an early age the necessity to preserve the democratic and legal institutions of the State. This was apparent throughout his own career, especially when serving on the Special Criminal Court at a time when the threat to the State and the rule of law was real. On one occasion, when entering Green Street for a difficult case, Ricky spied the late Eamon Leahy SC and told him that he need have no worries as it was the "A team" on the bench that day. On being informed by Leahy that he was defending on that occasion, Ricky repeated that he need have no worries, as it was the "A team" on today.

But Ricky also learnt the Parnellite independence, integrity, humanity and radicalism from his father. As a district justice, his father spoke out against the committal of orphans and disadvantaged children to industrial schools, and was the author of a powerful play, *The Evidence I Shall Give*, performed in the Abbey, which exposed this practice.

Ricky grew up in Tralee and was educated in Glenstal Abbey, for which he retained a lifelong affection, and which nurtured his deep, thoughtful and happy religious faith. Indeed, Glenstal was at least partially responsible for Ricky's determination to extract the maximum fun and enjoyment out of life. He was truly a *Homo Ludens* – a man at play.

Ricky used to say that he could tolerate every frailty in his fellow human beings except that of dullness. Ricky was never dull and life around Ricky was never dull. The twinkle never left his eyes to the end.

After school, he studied law in UCD, where he excelled in Dram Soc and the Literary and Historical Society. In the bear pit atmosphere of the L&H, Ricky won the gold medal for debate and was also to the fore in many stunts. Notwithstanding the fact that he was defeated for Auditor, he retained a great love of that society, being the keynote speaker at the launch of its 2005 *History* and, indeed, was buried wearing its tie.

It was in UCD that he met Nuala Gleeson, who he married in 1966. It was a marriage of equals. They had four children, Rebecca, Murray, Kerry and Emily, two of whom, Murray and Kerry, followed him to the Bar, where they maintain the same high standards of integrity as their father.

A career marked by grace and confidence

After his call to the Bar, Ricky joined the Munster Circuit and practised as a junior in the south west at a time when judges were slow and productivity was low. However, Ricky rapidly made his name on Circuit and his career blossomed, notwithstanding the fact that no State briefs were available to him as they were allocated entirely on a political basis. At the start of his career there was no right to legal aid, but notwithstanding that fact, he flourished both on the civil side and in criminal defence work.

Facilities on Circuit were basic; consultations were held outside country venues with maps spread over the bonnets of cars. Once in Listowel, a female plaintiff waited with her solicitor in his car until her consultation could take place and she enquired which of the assembled barristers was hers. "There he is" said the solicitor, "Mr Richard Parnell Fitzgibbon Johnson, Barrister at Law", pointing at Ricky who was poring over a map in another case. "What do you think?", to which the client replied "Tasty"!

Ricky took silk in 1977 and enjoyed a busy general practice, examining and cross-examining with a precision and ease that frequently lulled a hostile witness into a false sense of security. Throughout his career he always managed to convey the impression that he bore his practice lightly. He had an ability to slide through the most impossible situations and emerge unscathed at the other side. It would be wrong, however, to imagine that this ease masked anything other than a rigorous approach to his cases.

In January 1987, he was appointed to the High Court and approached his cases with a common sense manner, always courteous but also with an inner steel. Ricky was especially courteous to younger barristers when dealing with his Monday morning lists. He managed to go through the large number of motions in front of him with a speed and an efficiency that has never been equalled. He later was in charge of the personal injuries list, and presided over a large number of significant trials in the Special Criminal Court.

In December 2006, to his surprise at a time when he was considering early retirement, he was appointed President of the High Court, and again approached that burdensome office with grace and confidence. He had no difficulty in delegating cases, as necessary, to his colleagues.

On his retirement in October 2009, he spoke from the bench to the effect that we do not need judges to be brilliant, but we do need honest and independent judges who are lacking in ambition. He had never forgotten the lessons of honesty, integrity and humanity he had learnt from his father.

A well-rounded gentleman, Richard Parnell Fitzgibbon Johnson, husband, father, grandfather, barrister, my first master, judge, President of the High Court, died on August 4, 2019. He is survived by Nuala, their children, grandchildren, and his siblings.

Richard Parnell Fitzgibbon Johnson died, but it was as Ricky that he presented himself to Saint Peter with a spring in his step, a twinkle in his eye – always a twinkle, never dull.

K.C.

Protecting the personal

Inappropriate use of personal data prior to a court hearing is both unethical and in contravention of the GDPR.

Miriam Reilly SC

Rachel Duffy BL

Notwithstanding the apparent dryness of the topic, the General Data Protection Regulation (GDPR) has a real and tangible impact on how personal information may be accessed and used. Following the introduction of the GDPR, every individual's right to privacy and the protection of their data has been afforded a statutory footing. Legislation now provides that a person's personal data must only be processed for a specified, explicit and legitimate purpose, and cannot be processed in any way that is not compatible with this purpose. Just as the safeguarding of data is fundamental, so too is the safeguarding of each citizen's right of unfettered access to the courts.

Instituting a claim for damages for personal injuries necessarily involves disclosure of potentially sensitive personal data, most notably medical and/or financial data. This is a statutory requirement, and plaintiffs bring their claims having been advised of their obligations. Obligations in respect of disclosure have strengthened in recent years. However, when handing over this personal information to their solicitors, plaintiffs are nonetheless entitled to presume that this data will be handled and processed in a manner consistent with the GDPR until the final determination of their case, and that the said data will be disposed of properly on conclusion.

Practice direction

The Oireachtas has made it a specific requirement that sensitive data is contained in pleadings.[1] Pleadings containing that personal information are then passed from the plaintiff's solicitors to the various relevant parties to the proceedings, including the defendant, their insurers and solicitors, experts engaged to consider same and, ultimately, the Courts Service. Each of these is legally obliged to process this data in line with the GDPR. As the litigation continues, further exchanges of sensitive data may occur through the discovery, inspection and disclosure processes. Similarly, when a defendant is required to disclose data, they also enjoy the presumption that this will be managed in accordance with the GDPR.

In his recent judgment in *Michael and Thomas Butler Ltd. and ors v Bosod Ltd. and ors*,[2] Kelly P. recorded his apprehension at the ease with which court files were being accessed and the lack of security surrounding same. Such was his apprehension that it gave rise to a practice direction[3] restricting original files' availability for inspection at the Central Office by any person, whether a party to the proceedings or otherwise. On foot thereof, a copy of any document may be made and furnished to a solicitor on record, or in the event of a party being a litigant in person, to the said litigant, upon the payment of the requisite fee. While the reasoning behind this practice direction is based on the maintenance of integrity of the court file, it further secures the confidentiality of pleadings and personal data prior to the hearing of a case.

Inappropriate media coverage

Notwithstanding the GDPR's provisions, and the above practice direction, there has, of late, been a proliferation of media coverage of cases that have yet to be heard by a court. Such is the nature of these reports that it cannot be disputed that journalists have had sight of the pleadings in advance of their reporting, with some explicitly referring to the contents of indorsements of claim. It stands to reason that journalists have obtained their information from a reliable source. If that is the case, it appears that somewhere along the chain of data controllers, the provisions of the GDPR have been ignored, and so too have litigants' entitlement to rely upon them. The fallout from this disregard is that plaintiffs, regardless of the merit of their claim, fall victim to the court of public opinion. Furthermore, this denies them their right to advance their claim in the manner which they wish, and thereafter have their cases heard and decided upon by a court.

Of course, this right does not exist in a vacuum but must be viewed in the overall context of legitimate public interest. Specific provision is made in the Regulation to protect public interest and the interests of third parties.[4] These provisions do not allow an individual's interests and fundamental freedoms to be disregarded.

Reporting of court business by a media free from restriction is of course vital in ensuring that justice is administered in public. However, it is difficult to see how reporting on cases where a hearing has yet to take place forms part of this purpose or is similarly vital. It is inappropriate for any entity or party, whether directly related to the proceedings or otherwise, to interfere with the right of the court to hear and act as adjudicator on matters before it.

The obligation on all data controllers in terms of how they handle and manage sensitive information is clear. Personal data cannot be used in any way that is inconsistent with the purpose for which it was disclosed by the data subject. Ensuring that such data does not find its way into the public domain until a claimant has taken the step of actually appearing in court, or of allowing the said personal data to be opened to a court, is a clear and continuing obligation on all data processors. In doing so, a data processor is in compliance with its statutory obligations and ensures that there is no interference in the judicial process.

References

1. S.10 (2) Civil Liability and Courts Act 2004 (as amended).
2. [2018] IEHC 702.
3. HC86 – Access to Court Files in the Superior Courts.
4. Art. 6(e) and (f) General Data Protection Regulation.

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