THE BAR
REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

Volume 24 Number 4
July 2019

The case for litigation funding

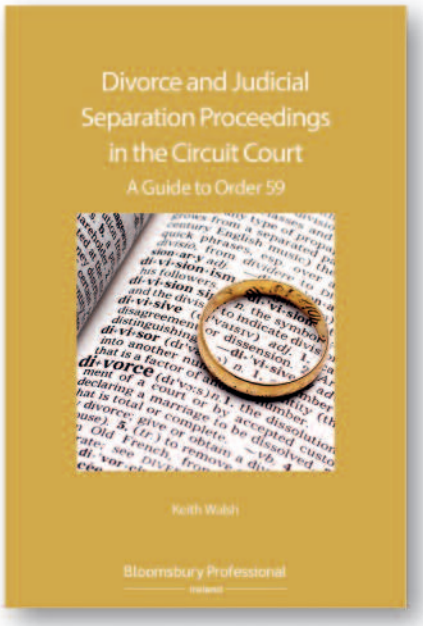
Divorce and Judicial Separation Proceedings in the Circuit Court

A Guide to Order 59

By Keith Walsh

Following 12 years of piecemeal amendments, 2017 and 2018 saw the Circuit Court make significant changes to family law Rules. Most notable among the changes was the Circuit Court Rules (Family Law) 2017 and the consolidation of Order 59.

With the vast majority of divorce and separation proceedings being dealt with at the Circuit Court level, it is vital for those working in the area of family law to come to grips with these developments. Divorce and Judicial Separation Proceedings in the Circuit Court aims to provide a practitioner-focussed reference guide to the new changes and rules. It is fully up to date, and includes the new Family Law Circuit Court Rules introduced in October 2018.



June 2019 | 9781526507105 | **€150.00**

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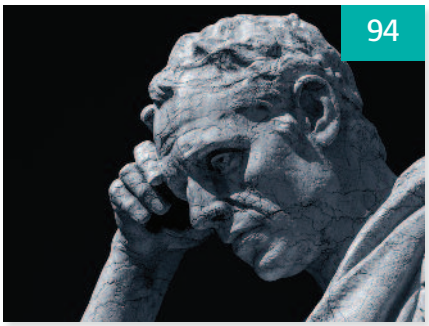

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An eventful year

The Bar of Ireland continues to respond to members' needs with new services and ongoing advocacy.

Congratulations to all members who participated in the recent elections to the Council of The Bar of Ireland. It is a credit to each member who put their name forward for the democratic process. I would also like to thank those members who have served on the Council and who complete their term of office this year. Members of the Law Library have been well served over many years by the commitment of each individual Council member to represent the interests of the profession and improve the working lives of all barristers.

Fee information and recovery

At its meeting in June 2019, the Council took a decision to establish an in-house fee information and recovery service. Surveys over many years have continuously highlighted fee recovery as a significant challenge for members. In 2014, the Council agreed to put an arrangement in place with a third-party company, LawServ, as a mechanism to assist members with the perennial fee collection problem. LawServ achieved a recovery rate of 28% over the last four years, recovering €1.1m of bills totalling €4m. However, the business model in that form is not sustainable without the support of The Bar of Ireland. Following many months of research and consultation among the members of Council and its committees, the Council took a decision to invest in the establishment of an in-house member service that will be available to all members. The detail of how the new service will operate is now being planned, and we hope to have it in place during the 2019/2020 legal year. It is intended that the service offering will be two-fold:

1. The provision of an information service for members to address gaps in practice management and provide a 'one-stop shop' for information in relation to the various schemes and panels operated by the State, and
2. The provision of a fee recovery service for members where they have been unsuccessful in collecting their own fees.

Member survey

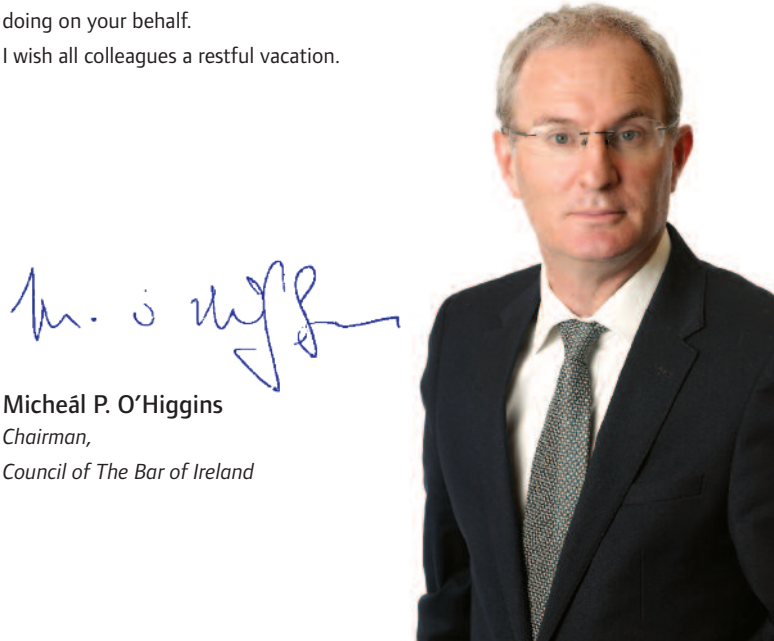
My sincere thanks to the 565 members who took the time to complete the recent member survey to assess the general well-being of the membership across six key strands: (i) peer-to-peer support; (ii) workload; (iii) attitudes towards the profession; (iv) stress levels; (v) health and well-being; and, (vi) bullying, discrimination and sexual harassment. The Council will have sight of the results of this survey at its meeting in July 2019 and I hope to be in a position to share the results with members thereafter.

Reform of the justice system

These past 12 months have seen an unprecedented scrutiny of the justice system, with a number of high-profile cases shining a spotlight on the operation of our courts system, in particular in cases relating to personal injury, medical negligence, sexual assault and other criminal matters. A lot of heat and debate has been generated over the last year in relation to the cost of insurance. In more recent weeks, there has been a greater level of scrutiny on the claims emanating from the insurance sector. Fraudulent claims are a concern for everyone. But they should not be exaggerated. The Courts Service published its Annual Report for 2018 and this report demonstrated that there was a significant decrease in personal injury awards in 2018, with no increase in the number of new personal injury cases before the courts last year. Yet despite this, insurance premiums, and insurer profits, continue to rise. How can this be? Insurance companies say an epidemic of fraudulent claims is to blame, yet their own figures don't appear to support this. If fraud is indeed so rampant, why isn't the insurance industry reporting cases to the Gardaí? It is of utmost importance that every measure introduced to tackle the high cost of insurance is based on facts and empirical data, and not propaganda or spin. For that reason, The Bar of Ireland is supportive of the introduction of a Judicial Council, which will have responsibility for creating guidelines in personal injury awards.

Looking back on my first year as Chairman, I feel a great sense of honour to have led such a committed cohort of volunteers, who have worked hard in the interest of all members of the Law Library. Over the past year, the Council and its committees have made submissions, attended meetings and spoken across the media on behalf of the profession about a range of issues. I hope that all members will take the time to read the Annual Report of The Bar of Ireland, which will be considered at the forthcoming AGM on July 22, 2019. It provides a deeper insight and more detailed information on what the Council has been doing on your behalf.

I wish all colleagues a restful vacation.



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

Landmark law

To even the most experienced practitioner, the Civil Liability Act 1961 often presents as an almost impenetrable thicket of mysteries. The recent *Defender v HSBC* litigation, set against the backdrop of the havoc caused by the Madoff Ponzi scheme, has thrown up some of the intricacies that can arise when a plaintiff settles with a "concurrent wrongdoer". Our writer drills down into the interlocking sections of the Act and analyses the implications of the *Defender* judgment.

EU law now permeates every aspect of Irish life but the effect of a recent judgment from the European Court of Justice marks a significant development in how such law is given effect. As a result of the ruling in *Minister for Justice and Equality v Workplace Relations Commission*, all statutory decision-making bodies, including the Workplace Relations Commission, the Refugee Appeals Commissioner and the Information Commissioner, will have to consider whether Irish legislation is consistent with any relevant EU law and, if not, whether the body should disapply the Irish legislation in favour of such law. We set out the ramifications of this landmark judgment. We also continue the debate on litigation funding, which is now a feature of most complex international litigation and arbitration. As Brexit approaches, we outline the arguments in favour of a relaxation of the ban on such practices in this jurisdiction.

Finally, as the current political impasse continues in Stormont, the Lord Chief Justice of Northern Ireland, Sir Declan Morgan, shares his frustrations about the lack of reforms in certain key areas of law and gives us his own insights on the difficulties with social media in the courtroom.

Happy vacation to one and all!

Eilis Brennan SC
Editor
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Faculty and members of the judiciary pictured at a recent Advanced Advocacy course were (from left): David Boughton BL; Helen Callanan SC; Barry Ward BL; Nuala Butler SC; Mr Justice Frank Clarke, Chief Justice; Mr Justice John Mac Menamin; Mary Rose Gearty SC; Jennifer O'Connell BL; Marguerite Bolger SC; and, Ms Justice Úna Ní Raifeartaigh.

Advancing your advocacy

One of the benefits of experience is becoming aware that, while we may be maintaining a reasonable standard of court performance in that we are still receiving enough work to pay the mortgage/rent/parents, we are not spending time on the core skills of the advocate: court presentation. It is impossible to practice and analyse witness-handling skills effectively by working alone.

This November, several of the most experienced advocacy trainers in the world will be in Dublin to train with members of The Bar of Ireland. If you are already one of the best barristers in the country, this will not be of interest to you, as you do not need to think about your performance in court. Well done!

If you would like to improve your advocacy skills in an environment where mistakes can be corrected, different approaches to questioning witnesses can be attempted, and nobody loses money or goes to jail, sign up to take the one-day course this November. Two further courses will be offered in 2020, one for the junior bar and one for those over seven years in practice, with a special workshop tailored to the needs of senior counsel.

Micheál P. O'Higgins, Chairman, Council of The Bar of Ireland, addressed guests at the Chairman's Dinner on June 27.

Chairman's Dinner 2019

The annual Chairman's Dinner took place in the King's Inns on June 27, attended by over 200 representatives of the many sectors of Irish society with whom the Bar interacts throughout the legal year, including the business, political and charitable communities.
We were honoured to welcome the Chief Justice, the Minister for Justice and Equality Charlie Flanagan TD, and a number of other ministers and members of the judiciary to a most enjoyable social occasion.

Special Criminal Court

The Special Criminal Court: Practice and Procedure *by Alice Harrison BL was launched by Ms Justice Iseult O'Malley in the historic Green St Courthouse on June 5, 2019. Pictured at the launch were: Alice Harrison BL (centre) with consultant editors Ms Justice Úna Ní Raifeartaigh and Michael Bowman SC.*

Pictured at the PRDBA Annual Conference were (from left): Dr Brian Doherty, CEO, Legal Services Regulatory Authority; Aideen Ryan, Consultant, DAC Beachcroft Dublin; Mr Justice Charles Meenan, Conference Chairperson; and, Ms Justice Mary Ellen Ring.

All about regulation

The Professional, Regulatory and Disciplinary Bar Association (PRDBA) hosted its 2019 Annual Conference, 'Update in Professional Regulatory Law', on Friday, May 17, 2019, in the Gaffney Room. There were 75 attendees, including members of the Law Library, solicitors and other guests.
The Conference Chairperson was Mr Justice Charles Meenan. Panel one discussed 'The Legal Services Regulatory Authority', 'The Regulated Professionals (Health and Social Care) (Amendment) Bill 2019', and 'The Charge of Misconduct in Public Office'.
Panel two discussed 'Developments in Regulatory Enforcement', 'The Power of the High Court to Vary and Increase Sanctions Imposed by Professional Bodies', and 'Health Issues in Regulatory Proceedings – Some Principles and Developments'.

Lawyers Against Homelessness

Ms Justice Mary Irvine addressing Lawyers Against Homelessness.

Lawyers Against Homelessness is a collaborative effort between barristers and solicitors to raise money for the Capuchin Day Centre through a series of CPD seminars.

After its fifth event in March 2019, the effort had raised over €110,000, 100% of which goes straight to Brother Kevin. In a letter of gratitude, Brother Kevin thanked the legal community for its support, saying "without the kindness and support of people like your good selves it would not be possible for us to continue to provide the same high standard of help and assistance to the most needy and vulnerable in Irish society".

Every day the Centre provides over 300 breakfasts and 550 lunches, as well as delivering 1,800 food parcels each week. It also provides medical, dental, optical and personal hygiene facilities.

The events award four CPD points to solicitor and barrister attendees for a small fee. Previous speakers have included: the Attorney General Seamus Woulfe SC; members of the judiciary (including Ms Justice Mary Irvine, Ms Justice Mary Baker and Mr Justice Seán Ryan); senior counsel and partners; and, junior members of both professions. At its most recent (sixth) event on June 27, the Chief Justice, Mr Justice Frank Clarke, and Mr Justice Bernard Barton were among the speakers.

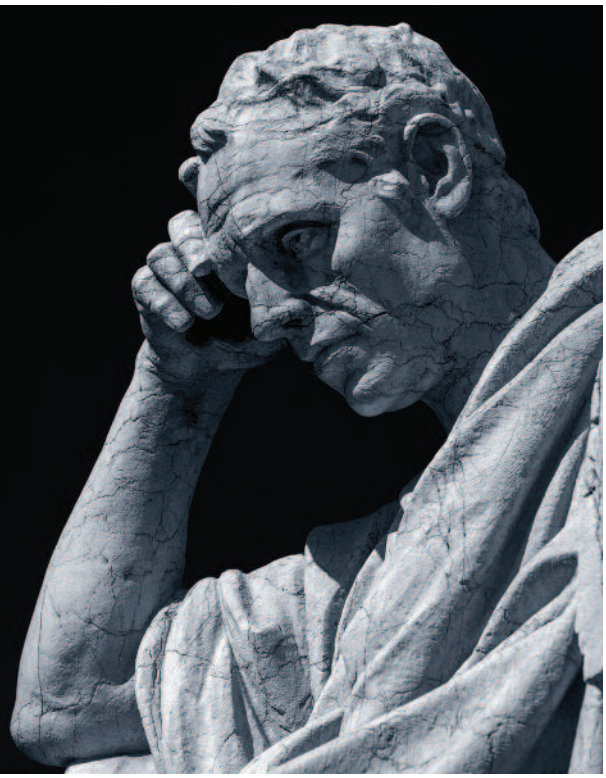
The next event will be held on November 21 from 3.30pm to 7.30pm in the Capuchin Centre and all colleagues are invited to attend, donate or speak at the event. For more information, please contact committee members Constance Cassidy SC, Arthur Cush BL or Sophie Honohan BL.

Support the Bar Benevolent Society

The annual collection for the Bar Benevolent Society is now underway. The Society's AGM took place on July 15, and was chaired by the Chief Justice, Mr Justice Frank Clarke.

Donations can be sent to Oonah McCrann SC, Finbarr Fox SC, John Lucey SC, John Doherty BL, and Adrianne Fields BL. The Society urgently needs the support of members.

Hearing from our judges



There is much to be gained from access to speeches and insights from our judiciary.

Niall Nolan BL

That the general public can learn about what a judge thinks about matters of national legal significance, or indeed about the humdrum of everyday life, can only increase understanding of and respect for our judges and, by natural extension, the rule of law. However, heretofore memoir and biography have been notably absent from the bookshelves. The impact judges can have on the life of an individual is, of course, immense, but hearing from them directly is rare. When they do speak extra judicially, we do well, as lawyer and non-lawyer alike, to listen for their insights, which can be fascinating and can dispel the mystique surrounding judges.[1]

Publications and speeches

For many years the UK's judges have produced writings of note, including Sir Thomas Bingham's seminal and oft-quoted *The Rule of Law*, Sir Stephen Sedley's *Ashes and Sparks*, and Sir Mark Hedley's *The Modern Judge: Power, Responsibility and Society's Expectations*. We await an Irish canon, one that would be infused with a particular national and cultural sentiment, and all the more interesting for that.

Another format in which lawyers and the public alike in the United Kingdom can learn about the judiciary and judicial thinking is through the publication of judges' speeches. In this regard the UK Supreme Court's website hosts 10 years of speeches on topics as diverse as 'The role of the judge in developing contract law' (Lord Hope, 2010), 'What is wrong with human rights?' (Lord Dyson, 2011), and '100 years of women in the law' (Lady Hale, May 2, 2019; supremecourt.gov.uk).[2] What a welcome development it would be if the many speeches our own judiciary delivers on various different occasions could be accommodated and accessed in such a way, on a customised and user-friendly platform.

In conversation

So, what are the current preoccupations of the judiciary, in particular of those sitting in appellate courts? What do they see as their functions, their challenges, their difficulties? Some light is shed on these topics by the recent publication of *The Power of Judges*,[3] a dialogue between David Neuberger, former President of the United Kingdom Supreme Court, and Peter Riddell, a British journalist and Commissioner for Public Appointments. The closeness of our common law systems in geographical terms is matched in my view by the proximity of the issues that exercise David Neuberger to those that regularly need to be addressed by our judges.

The duo first discuss the concept of justice, the view that members of the judiciary are a caste apart, and the corrosive effects of the high cost of accessing justice, with the former President observing in the process that: "… there is a risk of the public losing confidence in a judiciary which is not representative and fairly selected".

They then move on to discuss the interlinking of religion and the law, judicial activism, the separation of powers, and Europe. On Brexit and the legal implications thereof, the former judge is as uncertain as the next person. However, he decries the notion of 'the judges versus the people', which gained traction at the time of the appeal in *R (Miller) v Secretary for State for Exiting*

the European Union[4] as "insidious nonsense".

The conversation also explores in detail essentially whether some judgments can be considered as being of a political nature and whether courts act as a counterbalance to government action (or inaction), especially where one party or regime has been in power for some time. David Neuberger believes they do. This debate is quite current in our own jurisdiction, with the recent judgment delivered by the Supreme Court in *Kerins v McGuinness and Ors*, a case concerning the constitutional separation of powers and the courts' ability to intervene in proceedings before Oireachtas committees. It takes little time to read this short work and while the insights to be gathered more than merit the effort, the limiting factor is of course its particular national perspectives.

Valuable contributions

In my view we need to hear a little more from our judges outside of the more formal contexts, and have those contributions properly recorded. Their erudition, humour and humility warrant just that, and would provide the public with a much fuller understanding and appreciation of how they discharge their difficult roles. Dedicated web pages of judges' speeches would be a welcome step along this path.

I leave you with the following. Speaking at his own recent valedictory ceremony of judicial power, the United Kingdom Supreme Court's Lord Sumption offered his successors a short judicial lexicon of "tell-tale" signs of the internal conflicts that arise when deciding hard cases (providing us all with some welcome insight into the judicial mind). It went, in part, as follows:

- "A Multi-Factorial Test" – We Can Do What We Like
- "A Common-Sense Approach" – We Can Do What We Like
- "Pragmatic" – We Can Do What We Like
- "Never Say Never" – Next Year We Can Do What We Like

References

1. See the recent interview by Patsy McGarry in *The Irish Times* (May 18, 2019) of Mr Justice Seán Ryan, on the tenth anniversary of the publication of his report following his investigation into Ireland's religious-run residential institutions, which appeared under the byline 'Anybody awkward was put somewhere. Ireland was closed, defensive and xenophobic'.
2. Judiciary.gov.uk also hosts links to speeches from Court of Appeal and High Court judges. Speeches from judges of Australia's High Court are also available online (www.hcourt.gov.au).
3. A 'Haus Curiosity' published by Haus Publishing. Haus Curiosities are inspired by the topical pamphlets of the interwar years, as well as by Einstein's advice to 'never lose a holy curiosity'.
4. [2018] AC 61.

The road to reconciliation

Sir Declan Morgan, Lord Chief Justice of Northern Ireland, reflects on 10 years in his post, on the soon-to-commence legacy inquests process, and the challenges caused by the current political impasse.

Ann-Marie Hardiman
Managing Editor at Think Media Ltd

Less than a year after Sir Declan Morgan was appointed Lord Chief Justice of Northern Ireland in July 2009, the justice function in the jurisdiction devolved to the local administration, and this very much informed his approach to the role: "I was conscious of the fact that the role of the judiciary was going to change in terms of its engagement in the public space. I saw it as my role to be alert to establishing relationships with the politicians who were responsible for the criminal justice system, but also with the other elements, such as the PSNI, the DPP, the Police Ombudsman, Probation Service, and others. My priority was to change the perception of the judiciary as being rather remote and unconnected, to a judiciary that was entirely independent, but that didn't regard that as some form of isolation".

Photograph: *Pacemaker for Belfast News Letter.*

It's an ongoing task, but one he feels has had some measure of success: "I think we're in a different place from where we were 10 years ago certainly. We as a judiciary now have a role in promoting changes to the criminal, civil and family justice system in this jurisdiction. We have a role, which we didn't necessarily ask for but which has come to us, in terms of dealing with some of the very difficult issues of the past. We also have a role now as a result of the development of the Human Rights Act of dealing with some of the most sensitive social issues in our jurisdiction".

Highs and lows

One project that Sir Declan is particularly proud of from the last decade is the Women in Law initiative, which he began in 2012 to address that fact that Northern Ireland had never had a female High Court judge, and while numbers of women entering the profession were high, the number taking silk was limited, and senior levels of the profession remained heavily male dominated: "These things don't just happen on their own; they're the product of leadership and some kind of process. What we did was to establish a series of lectures and meetings. We set up a mentorship scheme, and made sure that the lectures were on areas outside family law, where women traditionally were strong, to

demonstrate the skills that were there".

The initiative has led to improvements (the first two female High Court judges were appointed in 2015), but Sir Declan acknowledges that there is more to do: "It sent a message to women that they shouldn't feel excluded. The principal thing we were trying to do was to make sure that we dealt with what was obviously a 'chill factor' in relation to women coming into these posts. There's still under-representation of women at the most senior levels in the legal professions. We have to continue to work to change that".

In terms of low points, undoubtedly the current political impasse in Northern Ireland (there has been no functioning Executive since January 2017) has had a significant chill factor of its own, effectively preventing much-needed reform of the criminal, civil and family justice systems: "It has been a huge impediment. Last Friday we met with a number of the political parties and provided them with an overview of where we thought substantial improvements could be made, but it is very frustrating to find that people are talking to us about these things, saying that they are things that undoubtedly improve the quality of justice within Northern Ireland, and then they all walk away because there's nothing anybody can do about it".

It's not a problem that can be easily solved: "Even when we get back to the process of having an active government in Northern Ireland, the pressures in terms of the build-up of things that haven't happened mean that it's going to take years to put this right, and that is deeply frustrating, particularly if, like me, you've only got about two and a half years to go".

[This interview took place prior to the Westminster votes on July 9, which will legalise same sex marriage and extend access to abortion in Northern Ireland if a new Stormont Executive is not formed by October 21.]

Facing the legacy of the past

One issue that is finally being addressed is that of legacy inquests. After confirmation that the Northern Ireland Department of Justice will provide £55m in funding over six years to deal with 52 legacy inquests involving 93 deaths during the period of the Troubles, Mrs Justice Keegan, the Presiding Coroner, will begin preliminary hearings in September with a view to the first inquests commencing in April of next year. Sir Declan is of course pleased that the process has finally begun, and is confident that the chosen approach is the best available: "We certainly believe that we have a process which can deliver what we said we could deliver, which is that we would complete the outstanding legacy inquests within a five-year timeframe".

He is keen that the inquests should not be conducted in an isolated fashion, but with an awareness of the wider context and highly complex sensitivities that exist in Northern Ireland: "Fundamentally, legacy should be focused upon reconciliation. When you've had a divided society like ours, reconciliation is really what the aim has got to be. And reconciliation of course is a process that is bound, given the hurt that has been caused over the last number of decades in this jurisdiction, to take a long time".

Indeed, there has already been criticism by, among others, campaigners on behalf of those killed while in the service of the State, who do not feel represented by this process. Sir Declan agrees: "I don't think the process so far is enough. I think we have failed a lot of people within our community by the fact that we have not dealt with this much earlier. This is something that, if we'd been able to do it, should have been addressed back in 1998. But we didn't address it because it was considered that it should be put into the 'too difficult' box. I think the effect of that has been that this has been a running sore now for the last 20 years and, like many running sores, it tends to get worse rather than better".

"Even when we get back to having an active government in Northern Ireland, the pressures in terms of the build-up of things that haven't happened mean that it's going to take years to put this right."

The challenge now is to move beyond the inquests through a process that respects and faces up to the horrors of the past, but with a clear objective of working towards a better future: "We need to think through how we're going to contribute to helping the others who've been affected by the past but who as yet see no concrete steps being taken in relation to trying to address their concerns. The purpose, as I say, is reconciliation, and part of that is about spending more time looking to the future than we have so far done. I don't mean by that that we should in any sense forget the past. What I want to do is to try to do something in relation to the past, which will enable us to spend a bit more time thinking about the future of our children in particular, in terms of education, health, quality of life".

In the end, while the legal system has a crucial role to play, it's the politicians and the wider community who have to decide how they want things to proceed: "My priority is to make sure that the rule of law is upheld in this jurisdiction and that people are confident about that. It's the politicians who need to think through what's going to work, and I will work with them in any way that I can".

Brexit

The prospect of a no-deal Brexit still looms large at the time of writing, and

Luck and happenstance

Sir Declan did not originally intend to pursue a career in law; indeed, when he went to Cambridge in 1970 (one of the first pupils from St Columb's College in Derry to attend Oxbridge), he began by studying mathematics, switching to law in his second year. After graduation, he tried accountancy in the City of London, before coming back to Derry and deciding to take the Bar exam: "It was only when I started to practise that I realised I really enjoyed it. So in my case there was an element of luck and happenstance in relation to my ending up in law".

He credits Cambridge with widening his view of the world: "It changed my perspective completely and utterly from that of a rather narrow background in the northwest of Ireland to a much broader experience of a range of people from very different backgrounds".

In his free time, Sir Declan enjoys spending time with his family, walking and cycling. He has also been taking evening classes in German for the last three years, and looks forward to putting them into practice when he visits Germany this summer.

this has obvious implications for north-south co-operation in legal matters. Measures have been put in place to try and deal with some of the most pressing, such as family law and enforceability of contracts, but Sir Declan acknowledges that the full impact is not yet apparent. He is confident, however, that the good relationship that exists between the judiciaries in the two jurisdictions will continue: "It is important, if there are issues arising, that we make sure that we do our best to deal with those and, where necessary, draw them to the attention of our governments. I think that is part of our role. We both recognise our separate independence and roles, but we also recognise that there are areas in which the work of one jurisdiction affects the other. One has to be realistic about these things in terms of ensuring that there is sensible co-operation where that doesn't in any way undermine the independence of the judiciary in either jurisdiction".

Acting on Gillen

The manner in which cases of alleged rape and sexual assault are dealt with in the courts has long been a source of controversy, but the enormous publicity surrounding the so-called 'Belfast rape trial' last year led the authorities in Northern Ireland to commission a review of how these offences are dealt with in that jurisdiction. Sir John Gillen's comprehensive report was published in May, and contains a number of recommendations, which Sir Declan welcomes: "John did a tremendous job in the report. It's clear that he looked at this from every possible angle. He's made a lot of recommendations, which I think will be very valuable to all of us. About 60 are related to the judiciary. They refer to things like better case management and judicial training, and the way in which we deal with complainant witnesses in particular and child witnesses when they come into the courts. We have already started work in relation to quite a lot of this". The nature of these cases means, however, that there's no easy fix: "It is very difficult to see how you can make these cases easy, because they are cases which involve such an emotional impact on, particularly complainants, but also from time to time defendants depending upon the circumstances. We can do things to ameliorate the position. We can seek to ensure that complainants feel as though they are being respected when they come to court, we can seek to ensure that questioning is confined to appropriate issues, that the period of time people spend in the witness box should be no more than is absolutely necessary, that cross-examination should not be oppressive or bullying, but it's still going to be a difficult experience for people insofar as we continue to have an adversarial court system".

Social conflict

The Belfast trial also highlighted the influence of social media, both in terms of evidence, and of coverage of and comment on the trial. The enormous cultural change brought about in recent years by our almost constant access to and hunger for information is something justice systems have struggled to deal with, and for Sir Declan, this is because of a fundamental conflict: "There's a huge conflict between a society which is geared towards the fact that it can have all the information it wants at the touch of a button, and a criminal law process where you're told that you can't look at any information other than that which is put in front of you in the trial … The public out there, who are not actually given the strictures that the jury will be given, as a matter of almost instinct are perfectly happy to express their views about anything and everything that comes their way".

"One has to be realistic about these things in terms of ensuring that there is sensible co-operation where that doesn't in any way undermine the independence of the judiciary in either jurisdiction".

Obviously this is not a problem confined to these islands, and various solutions, such as fining social media companies if they fail to remove items from their platforms, have been suggested, but as yet no concrete solution has presented itself, and this poses serious problems: "The real worry is that these cases are not being tried in the jury room any more, they're being tried in the media. We probably need to look at this on an international basis if we're going to do something about it, or are we really going to leave it to Facebook or others to regulate the way in which this information is shared?"

He agrees that education of the public has a role to play, and regularly visits schools to try to address this: "It is remarkable how engaged the children are and how greedy for an understanding of how the justice system works within their community. I've always been hugely impressed by that but I've also realised more and more during my time as Chief Justice how important that is in encouraging people to understand and respect the rule of law".

Future plans

As he approaches the final years of his tenure, Sir Declan speaks of moving from getting things done to getting things started; however, this doesn't mean that work is slowing down. The legacy inquest process is obviously a priority, but a number of other projects are also in train: "There are changes that we want to make to our criminal justice system, which I think is much too slow and doesn't provide our community with the service that it deserves. We have also been looking at exposing the work of the family courts to the public eye somewhat. There is sometimes a suggestion, particularly from disappointed litigants, that the family court is not in the public eye and that in some way or other it is a secret court. We are in the course of a pilot project in the High Court in having media access to family cases".

A business and property court has also recently been established, influenced by similar courts in England and Wales, and also by the work of Mr Justice Peter Kelly in the Commercial Court in the Republic. Structural changes to how the courts system is managed are also on the agenda, although once again the current political situation is inhibiting progress: "We would like to structurally move into the same sort of approach that you have in the Republic of Ireland and Scotland, where you have a non-ministerial department, which is judge led, and runs the courts and the support for the courts, leaving the policy functions with the Department".

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

Volume 24 Number 4
July 2019

A directory of legislation, articles and acquisitions received in the Law Library from May 2, 2019 to June 20, 2019.
Judgment information supplied by Justis Publishing Ltd. Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.

AGRICULTURE

Statutory instruments
Chemicals act 2008 (Rotterdam regulation) regulations 2019 – SI 213/2019
Diseases of poultry (compensation) regulations 2019 – SI 244/2019
Animal health (trade in salamanders) regulations 2019 – SI 245/2019

ANIMALS

Acts
Greyhound Racing Act 2019 – Act 15/2019 – Signed on June 28, 2019

BANKING

Banking and finance – Loan facilities – Plenary hearing – Plaintiff claiming that a total sum of €3,818,694.72 was due and owing by the defendant on foot of five loan facilities granted to the appellant – Whether all the loan facilities were interlinked – [2019] IECA 118 – 27/03/2019
Allied Irish Banks Plc v McPhillips
Banking and finance – Debt – Evidential dispute – Plaintiff seeking judgment against the defendants in respect of a loan agreement – Whether the plaintiff failed to comply with the mandatory statutory provisions of the Consumer Credit Act 1995 – [2019] IEHC 234 – 12/04/2019
Bank of Ireland Mortgage Bank v Murray
Summary judgment – Costs – Personal guarantees – Plaintiff seeking summary judgment – Whether the case was based on documents – [2019] IEHC 331 – 20/05/2019
Deutsche Bank AG v H.B. Dennis Motors (Fairview) Ltd; Deutsche Bank AG v H.B. Dennis Motors Ltd

Statutory instruments
Central Bank (supervision and enforcement) act 2013 (section 48(1)) (undertakings for collective investment in transferable securities) regulations 2019 – SI 230/2019

BROADCASTING

Statutory instruments
Wireless telegraphy (public service television and sound broadcasting licences) regulations 2019 – SI 197/2019

CHILDREN

Special care order – Statutory threshold – Right to liberty – Appellant seeking to set aside special care order – Whether the statutory threshold for the making of the special care order was met – [2019] IECA 109 – 12/04/2019
Child and Family Agency v M.L. (Otherwise G.)

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Articles
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COMPANY LAW
Company – Liquidation – Companies Act 2014 s. 819(1) – Applicant seeking an order that the respondents should not be appointed or act in any way as a director or secretary of a company – Whether the respondents acted responsibly in relation to the conduct of the affairs of the company – [2019] IEHC 261 – 30/04/2019
Luby v Logan
Company – Insolvency – Order of restriction – Applicant seeking an order restricting the respondent from acting as a director of a company – Whether the respondent acted responsibly in relation to the conduct of the affairs of the company – [2019] IEHC 299 – 08/05/2019
Van Dessel v Fitzsimons

Statutory instruments
Companies act 2014 (section 1408(2)) (relevant jurisdictions) regulations 2019 – SI 192/2019
Companies act 2014 (section 1412(2)) (relevant jurisdictions) regulations 2019 – SI 193/2019

COMPETITION LAW

Articles
Cross, M. Why did the cartel cross the road? *Law Society Gazette* 2019; (May): 22

CONSTITUTIONAL LAW

Constitutional law – European Union law – United States law – Appellant seeking leave to appeal to the Supreme Court – Whether any appeal lies to the Supreme Court – [2019] IESC 46 – 31/05/2019
Data Protection Commissioner v Facebook

CONTRACT

Jurisdiction – Regulation (EU) 1215/2012 – Place of domicile – Defendant contesting the jurisdiction of the Irish courts to hear and determine the substantive case of the plaintiff – Whether Romania was the proper jurisdiction in which to hear all of the plaintiffs' claims – [2019] IEHC 239 – 14/01/2019
Ryanair dac v SC Vola.ro srl

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COSTS

Costs – Medical negligence – Damages – Plaintiff seeking to recover costs – Whether costs should follow the event – [2019] IEHC 302 – 10/05/2019
Anderson v Birthistle
Costs – Judicial review – Moot proceedings – Applicant seeking costs of a judicial review application which had become moot – Whether the cause of the mootness was either the unilateral act of one of the parties or an underlying external change of circumstance – [2019] IEHC 147 – 08/03/2019
Hughes v The Revenue Commissioners

Articles
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Circuit Court rules (personal injuries: section 8 notices) 2019 – SI 215/2019
Rules of the superior courts (personal injuries: section 8 notices) 2019 – SI 216/2019
Circuit Court rules (renewal of civil bill) 2019 – SI 221/2019
Circuit Court rules (data protection actions) 2019 – SI 222/2019
Rules of the superior courts (data protection actions) 2019 – SI 223/2019
Rules of the superior courts (renewal

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District Court (estreatment) rules 2019 – SI 225/2019
District Court (order 24) rules 2019 – SI 226/2019
Courts (supplemental provisions) act 1961 (judicial remuneration) (section 46(9)) order 2019 – SI 256/2019
Courts (supplemental provisions) act 1961 (judicial remuneration) (section 46(9A)) order 2019 – SI 257/2019

CRIMINAL LAW

Conviction – Sexual offences – Charge to jury – Appellant seeking to appeal against conviction – Whether the trial judge erred in fact and/or in law – [2019] IECA 121 – 12/04/2019
DPP v B.D.
Conviction – Unlawful possession of explosive substances – Sufficiency of evidence – Appellant seeking to appeal against conviction – Whether there was insufficient evidence to ground a conviction – [2019] IECA 149 – 28/05/2019
DPP v Billings
Sentencing – Drug offences – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 133 – 02/04/2019
DPP v Cambridge
Sentencing – Assault causing harm – Undue leniency – Applicant seeking review of sentence –- Whether sentence was unduly lenient – [2019] IECA 143 – 13/05/2019
DPP v Crilly
Sentencing – False imprisonment – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – [2018] IECA 413 – 20/12/2018
DPP v Cummins
Sentencing – Defilement of a child under the age of fifteen years – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 47 – 13/05/2019
DPP v D.M.
Disqualification order – Duration – Holding a driver's licence – Appellant seeking to appeal against the duration of an order disqualifying him from holding a driver's licence – Whether the judge in the Circuit Court failed to address the question of what was the appropriate disqualification for the particular offender before the Court – [2019] IECA 107 – 02/04/2019
Director of Public Prosecution v Doody
Sentencing – Arson – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – [2019] IECA 134 – 30/04/2019
DPP v Farrell
Convictions – Murder – False imprisonment – Appellant seeking to appeal against convictions – Whether the alleged identification of the appellant by the witness should have been regarded as tainted – [2019] IESC 45 – 10/05/2019
DPP v Gruchacz
Conviction – Rape – Reasonable doubt – Appellant seeking to appeal against conviction – Whether the trial judge erred in failing to properly or adequately direct the jury on reasonable doubt – [2019] IECA 129 – 21/02/2019
DPP v Halligan
Sentencing – Sexual offences – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 137 – 13/05/2019
DPP v Hearne
Sentencing – Violent disorder – Undue leniency – Applicant seeking review of sentences – Whether sentences were unduly lenient – [2019] IECA 127 – 05/04/2019
DPP v J. O'D
Sentencing – Sexual offences – Severity of sentences – Appellant seeking to appeal against sentences – Whether sentences were unduly severe – [2019] IECA 126 – 11/04/2019
DPP v K.C.
Conviction – Burglary – Damaging property – Appellant seeking to appeal against conviction – Whether the trial judge failed to adequately explain the defence case – [2019] IECA 144 – 08/05/2019
DPP v Kane
Sentencing – Sexual offences – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 95 – 29/03/2019
DPP v Kelly
Conviction – Sentencing – Manslaughter – Appellant seeking to appeal against conviction and sentence – Whether the trial judge erred in failing to properly direct the jury as to the law in relation to intention as it applied to the alleged offence and to the particular factual circumstances of the case – [2019] IECA 122 – 12/04/2019
DPP v Kierans
Sentencing – Handling stolen property – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 131 – 04/03/2019
DPP v Lyons
Sentencing – Manslaughter – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IESC 24 – 11/04/2019
DPP v Mahon
Consultative case stated – Prosecution – Evidential presumptions – Consultative case stated from the District Court – Whether the evidential presumptions applicable to a statement applied equally to a photocopy of such a statement – [2019] IEHC 236 – 12/04/2019
DPP (at the suit of Garda Conor Gurn) v McGrath
Sentencing – Violent disorder – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 132 – 01/04/2019
DPP v McInerney
Conviction – Murder – Provocation – Appellant seeking to appeal against conviction – Whether the judge erred in refusing to allow the jury to consider the partial defence of provocation – [2019] IECA 48 – 28/05/2019
DPP v McNamara
Conviction – Indecent assault – Charge to jury – Appellant seeking to appeal against conviction – Whether the trial judge erred in law and in principle when charging the jury that they were to disregard the evidence of the complainant – [2019] IECA 120 – 10/04/2019
DPP v M.S.
Sentencing – Burglary – Undue leniency – Applicant seeking review of sentence – Whether the sentence was unduly lenient – [2019] IECA 135 – 07/05/2019
DPP v O'Hare
Sentencing – Criminal damage – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 108 – 05/04/2019
DPP v Rae
Sentencing – Sexual assault – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – [2019] IECA 130 – 08/05/2019
DPP v Rashid
Conviction – Murder – Unsafe verdict – Appellant seeking to appeal against conviction – Whether verdict was unsafe – [2019] IECA 128 – 21/02/2019
DPP v Trebacz
False imprisonment – Trespass to the person – Preliminary question – Plaintiff seeking to set aside the order of the High Court – Whether the defendants could satisfy the test for withdrawing the case from the jury – [2019] IESC 21 – 10/04/2019
Reid v Commissioner of An Garda Síochána
Prosecution – Arson – Delay – Applicant seeking to restrain the further prosecution of criminal charges pending against him – Whether there was blameworthy prosecutorial delay – [2019] IEHC 303 – 10/05/2019
T.G. v DPP

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McLoughlin-Burke, G. The effect of delay in cases of historic child sexual abuse. *Irish Criminal Law Journal* 2019; (29) (2): 26

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DAMAGES

Preliminary issues – Time limits – Damages – Plaintiff seeking damages and declaratory reliefs – Whether the plaintiff's causes of action were time barred – [2019] IEHC 237 – 13/02/2019
Browne v Minister for Agriculture, Fisheries and Food
Damages – Assault and battery – Reasonable cause of action – Defendants seeking an order striking out the plaintiff's claim for damages for assault and battery – Whether the plaintiff's claim disclosed no reasonable cause of action – [2019] IEHC 334 – 21/05/2019
O'Brien v Wohlman
Statement of claim – Amendment – Damages – Plaintiffs seeking leave to amend its statement of claim – Whether an amendment would be required – [2019] IEHC 295 – 08/05/2019
Persona Digital Telephony Ltd v Minister for Public Enterprise

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Smith, G. Standing firm in the face of attack. *Law Society Gazette* 2019; (May): 18

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Data sharing and governance act 2019 (commencement of certain provisions) order 2019 – SI 189/2019

DEFAMATION

Defamation – Damages – Right to

privacy – Respondent seeking damages in respect of breaches of his constitutional right to privacy – Whether the right to privacy was engaged – [2019] IECA 141 – 15/05/2019
Nolan v Sunday Newspapers Ltd (trading as Sunday World)

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O'Higgins, C. Who goes there? *Law Society Gazette* 2019; (May): 42

DELAY

Prosecution – Delay – Public interest – Applicant seeking to prohibit respondents from further prosecuting him – Whether there was culpable delay – [2019] IEHC 296 – 03/05/2019
Bernotas v The Commissioner of An Garda Síochána
Want of prosecution – Inordinate and/or inexcusable delay – Harassment – Defendants seeking an order dismissing the plaintiff's claim for want of prosecution – Whether there had been inordinate and/or inexcusable delay – [2019] IEHC 295 – 03/05/2019
Fox v Cherry Orchard Hospital
Inordinate and inexcusable delay – Balance of justice – Motion to dismiss – Defendant seeking to have the plaintiff's claim dismissed by reason of the inordinate and inexcusable delay of the plaintiff in prosecuting his claim – Whether the balance of justice favoured dismissing rather than continuing the proceedings – [2018] IEHC 374 – 26/06/2018
Lyden v Irish Bank Resolution Corporation Ltd (in special liquidation)

DISCOVERY

Discovery – Categories of documents – Proceeds of sale – Parties seeking categories of documents – Whether categories were excessively broad – [2019] IEHC 276 – 02/05/2019
Munich 1 Property Fund GmbH v Gemside Ltd
Naturalisation – Privilege – Disclosure – Appellant seeking to challenge the respondent's decision refusing naturalisation – Whether the decision not to disclose further reasons had been justified – [2019] IESC 47 – 31/05/2019
P v Minister for Justice and Equality
Discovery – Damages – Malicious prosecution – Plaintiffs seeking discovery – Whether information was privileged – [2019] IEHC 279 – 05/04/2019
Tracey v Ireland

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European parliament elections (amendment) act 2019 (commencement) (no.2) order 2019 – SI 220/2019

EMPLOYMENT LAW

Statutory instruments
Safety, health and welfare at work (quarries) (amendment) regulations 2019 – SI 179/2019
Industrial training (process analytics industry) order 2019 – SI 200/2019
Sectoral employment order (construction sector) 2019 – SI 234/2019
Sectoral employment order (electrical contracting sector) 2019 – SI 251/2019

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EUROPEAN UNION

European arrest warrant – Surrender – Inhuman and degrading conditions – Respondent objecting to his surrender – Whether the respondent would be subject to a real risk of being exposed to inhuman and degrading conditions – [2019] IEHC 251 – 10/04/2019
Minister for Justice and Equality v A.W.
European arrest warrant – Surrender – Inhuman and degrading treatment – Applicant seeking the surrender of the respondent to Romania pursuant to a European arrest warrant – Whether the respondent was at real risk of being subjected to inhuman and degrading treatment on surrender by virtue of the prison conditions in Romania – [2019] IEHC 250 – 20/03/2019
Minister for Justice and Equality v Iacobuta
European arrest warrant – Surrender – Fair trial rights – Respondent objecting to his surrender pursuant to a European arrest warrant – Whether the respondent's surrender was prohibited because a cassation appeal was heard in his absence – [2019] IEHC 248 – 08/04/2019
Minister for Justice and Equality v Jefisovas
European arrest warrants – Surrender – Assurances – Respondent objecting to his surrender in respect of European arrest warrants – Whether the respondent's surrender was prohibited under the European Arrest Warrant Act 2003 – [2019] IEHC 249 – 29/03/2019
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Padian, G. Mullooly, A. Brexit: an opportunity for Irish innovation? *Law Society Gazette* 2019; (June): 32

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European Union (restrictive measures concerning Ukraine) regulations (no. 2) 2019 – SI 184/2019
European Union (restrictive measures concerning Egypt) regulations 2019 – SI 186/2019
European Union (restrictive measures concerning Iraq) regulations (no. 2) 2019 – SI 187/2019
European Communities (marketing of fruit plant propagating material) (amendment) regulations 2019 – SI 198/2019
European Union (seed potatoes) (amendment) regulations 2019 – SI 199/2019
European Union habitats (Ballyvaughan Turlough special area of conservation 000996) regulations 2019 – SI 205/2019
European Union habitats (Great Island Channel special area of conservation 001058) regulations 2019 – SI 206/2019
European Union habitats (Inishmore Island special area of conservation 000213) regulations 2019 – SI 207/2019
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European Union habitats (Curraghchase Woods special area of conservation 000174) regulations 2019 – SI 209/2019
European Union habitats (Keel Machair/Menaun Cliffs special area of conservation 001513) regulations 2019 – SI 210/2019
European Union habitats (Lough Funshinagh special area of conservation 000611) regulations 2019 – SI 211/2019
European Union habitats (Vale of Clara (Rathdrum wood) special area of conservation 000733) regulations 2019 – SI 212/2019
European Communities (control of organisms harmful to plants and plant products) (amendment) regulations 2019 – SI 227/2019
European Union (waste electrical and electronic equipment) (amendment) regulations 2019 – SI 233/2019
European Union (renewable energy) (amendment) (no. 2) regulations 2019 – SI 237/2019
European Union (food additives) (amendment) regulations 2019 – SI 240/2019
European communities (sheep identification) (amendment) regulations 2019 – SI 243/2019
European Union (restriction of certain hazardous substances in electrical and electronic equipment) (amendment) regulations 2019 – SI 246/2019
European Union (transport of dangerous goods by rail) (amendment) regulations 2019 – SI 247/2019
European Communities (official controls on the import of food of non-animal origin for pesticide residues) (amendment) regulations 2019 – SI 248/2019
European Union (greenhouse gas emission reductions, calculation methods and reporting requirements) (amendment) regulations 2019 – SI 249/2019
European Union (Nagoya protocol on access to genetic resources and benefit-sharing) regulations 2019 – SI 253/2019
European Union (carcase classification and price reporting) regulations 2019 – SI 254/2019
European Union (payment services) (amendment) regulations 2019 – SI 255/2019
European Union (electronic invoicing in public procurement) regulations 2019 – SI 258/2019

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Articles
Glynn, B. Extent of the duty of An Garda Síochána to preserve evidence. *Irish Law Times* 2019; (37) (9): 129

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Marriage – Decree of nullity – Duress – Petitioner seeking a decree of nullity – Whether the respondent subjected the petitioner to duress to the extent that their marriage took place without her consent – [2019] IEHC 246 – 29/03/2019
A.R. v D.R.
Consultative case stated – Ex parte order – Jurisdiction – District judge stating a case for determination by the High Court – In exceptional circumstances, does the District Court have jurisdiction to make an ex parte order pursuant to sections 6A and section 11 of the Guardianship of Infants Act 1964, notwithstanding the general principle that the application should be on notice to all interested parties? – [2019] IEHC 283 – 30/04/2019
C.G. v K.Q.
Family reunification – International Protection Act s. 56 – Natural parent – Applicant seeking family reunification – Whether s. 56(9)(d) of the International Protection Act 2015 requires that a sponsor be the natural parent of a child – [2019] IEHC 284 – 03/05/2019
X v The Minister for Justice and Equality

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Acts

Parental Leave (Amendment) Act 2019 – Act 11/2019 – Signed on May 22, 2019

FINANCIAL SERVICES

Statutory instruments

Irish collective asset-management vehicles act 2015 (section 145(2)) (relevant jurisdictions) (amendment) regulations 2019 – SI 194/2019
Irish collective asset-management vehicles act 2015 (section 149(2)) (relevant jurisdictions) (amendment) regulations 2019 – SI 195/2019
Financial services and pensions ombudsman act 2017 [Financial Services and Pensions Ombudsman Council] financial services industry levy regulations 2019 – SI 201/2019

GOVERNMENT

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Diplomatic and consular fees (amendment) regulations 2019 – SI 259/2019

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Health and social care professionals (amendment) act 2019 – Act 16/2019 – Signed on: June 4, 2019
Health Service Executive (Governance) Act 2019 – Act 17/2019 – Signed on June 5, 2019

IMMIGRATION

Immigration and asylum – Transfer order – Judicial review – Appellants seeking judicial review – Whether the office of the Refugee Applications Commissioner breached the requirements of Article 34(4) of the Dublin III Regulation – [2019] IESC 32 – 22/05/2019
BS and RS v The Refugee Appeals Tribunal
Immigration and asylum – Subsidiary protection – Judicial review – Applicant seeking an order of certiorari quashing the respondent's decision – Whether the respondent erred in law in failing to apply the correct test for assessing the availability of state protection – [2019] IEHC 300 – 10/05/2019
C.G. v The International Protection Appeals Tribunal
Immigration – Visas – Long-term residence – Applicant seeking to stay in Ireland on a long-term basis – Whether through s. 4(7) of the Immigration Act 2004 the Oireachtas ended the understanding of short-term visas as facilitating brief visits to Ireland and transformed such visas into a first step (at a visitor's election) towards long-term residence – [2019] IEHC 310 – 13/05/2019
Chen v The Minister for Justice and Equality
Deportation – Judicial review – Proportionality – Applicants seeking certiorari of a deportation order – Whether there was a lack of proportionality analysis – [2019] IEHC 64 – 29/04/2019
D.O.A. (Nigeria) v The Minister for Justice and Equality
Immigration and asylum – Subsidiary protection – Credibility – Applicant seeking subsidiary protection – Whether the respondent erred in law in rejecting the credibility of the applicant's claim – 2019] IEHC 212 – 02/04/2019
D.S. (Nepal) v The International Protection Appeals Tribunal
Deportation – Judicial review – Proportionality – Applicant seeking an order of certiorari quashing the decision to affirm a deportation order – Whether the decision was disproportionate – [2019] IEHC 263 – 12/04/2019
F.A.F. (Nigeria) v The Minister for Justice and Equality
Family reunification – Naturalised citizens – Refugee status – Appellants seeking family reunification – Whether a declaration of refugee status automatically, by operation of law, ceases to have effect once a person becomes a naturalised citizen – [2019] IECA 116 – 29/03/2019
M.A.M. v Minister for Justice and Equality; K.N. v Minister for Justice and Equality
Immigration – Deportation order – Revocation – Applicants seeking an order of certiorari quashing the respondent's decision to refuse to revoke a deportation order – Whether the impugned decision treated the best interests of the child as a primary consideration – [2019] IECA 123 – 22/02/2019
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Refugee status – Order of certiorari – Rationality – Applicants seeking refugee status – Whether the respondent's decision failed the test of rationality or reasonableness – [2019] IEHC 298 – 08/05/2019
O.P. v The Minister for Justice and Equality
Immigration – Permission to reside in the State – Judicial review – Applicant seeking judicial review of a decision of the respondent – Whether the respondent erred in law in refusing to consider the applicant's application for permission to reside in the State – [2019] IEHC 369 – 28/05/2019
P.F. v The Minister for Justice and Equality
International protection – Order of certiorari – Mootness – Applicant seeking international protection – Whether the applicant's claim was moot – [2019] IEHC 179 – 22/03/2019
P.N.S. (Cameroon) v The International Protection Appeals Tribunal
Refugee status – Breach of fair procedures – Credibility – Applicant seeking judicial review – Whether the International Protection Appeals Tribunal acted in breach of fair procedures and natural and constitutional justice – [2019] IEHC 269 – 03/05/2019
S.H.I. v The International Protection Tribunal No.2
Refugee status – Order of certiorari – Standard of proof – Applicant seeking refugee status – Whether the respondent failed to apply the correct standard of proof – [2019] IHEC 297 – 09/052019
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Comparative advertising – Injunction – Costs – Appellants seeking a declaration that the advertising carried out by the respondent was not permitted comparative advertising – Whether the advertising campaign was illegal by reference to the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 – [2019] IESC 41 – 28/05/2019
Aldi Stores Ireland Ltd v Dunnes Stores
Injunctions – Declarations – Order of mandamus – Plaintiff seeking injunctions, declarations and an order of mandamus by reference to alleged breaches by the State of Article 40.3 of the Constitution – Whether the proceedings were frivolous and vexatious – [2019] IEHC 241 – 12/04/2019
B.W. v Ireland
Interlocutory injunction – Mortgages – Receivers – Respondents seeking an interlocutory injunction – Whether it was arguable that the respondents were not validly appointed as receivers on foot of mortgages – [2019] IESC 28 – 08/05/2019
Charleton v Scriven
Interlocutory injunction – Commercial properties – Sale – Plaintiffs seeking an interlocutory injunction restraining the defendant from selling commercial properties pending the determination of the proceedings – Whether damages were an adequate remedy for the plaintiffs – [2019] IEHC 213 – 10/04/2019
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Statement of claim – Amendment – Damages – Plaintiffs seeking leave to

amend its statement of claim – Whether an amendment would be required – [2019] IEHC 295 – 08/05/2019
Persona Digital Telephony Ltd v Minister for Public Enterprise
Injunction – Suspension – School – Applicant seeking an interlocutory injunction restraining the respondent from enforcing the suspension imposed on the applicant – Whether the injunction ought to be granted – [2019] IEHC 230 – 29/03/2019
X (A Minor) v The Board of Management of School Z

INQUEST

Inquest – Coroners Act 1962 s. 30 – Judicial review – Applicants seeking judicial review – Whether the respondent misconstrued the meaning and effect of s. 30 of the Coroners Act 1962 – [2019] IEHC 273 – 03/04/2019
Loughlin v The Coroner for the Counties of Sligo and Leitrim

JUDICIAL REVIEW

Judicial review – Tenancy – Extension of time – Applicant seeking to quash the decision of the respondent – Whether an extension of time should be granted – [2019] IEHC 327 – 21/05/2019
Ayeni v Residential Tenancies Board
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Bills initiated in Dáil Éireann during the period May 2, 2019, to June 20, 2019

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

Domestic Violence (No-Contact Order) (Amendment) Bill 2019 – Bill 34/2019 [pmb] – Deputy Ruth Coppinger
Health (Amendment) Bill 2019 – Bill 38/2019 [pmb] – Deputy Louise O'Reilly
Microbeads (Prohibition) Bill 2019 – Bill 41/2019
Organisation of Working Time (Workers' Rights and Bogus Self-Employment) (Amendment) Bill 2019 – Bill 40/2019 [pmb] – Deputy John Brady, Deputy David Cullinane, and Deputy Maurice Quinlivan
Planning and Development (Climate Measures) (Amendment) Bill 2019 – Bill 37/2019 [pmb] – Deputy Richard Boyd Barrett, Deputy Gino Kenny, and Deputy Bríd Smith
Residential Tenancies (Complaints of Anti-Social Behaviour and Neglect of Dwelling Exteriors) (Amendment) Bill 2019 – Bill 36/2019 [pmb] – Deputy Darragh O'Brien

Bills initiated in Seanad Éireann during the period May 2, 2019, to June 20, 2019

Community Participation (Disability) (Miscellaneous Provisions) Bill 2019 – Bill 39/2019 [pmb] – Senator Alice-Mary Higgins, Senator Máire Devine, Senator Victor Boyhan, Senator Ivana Bacik, Senator Frances Black, Senator Lynn Ruane, Senator Colette Kelleher, and Senator John Dolan
Electoral (Civil Society Freedom) (Amendment) Bill 2019 – Bill 35/2019 [pmb] – Senator Fintan Warfield, Senator Victor Boyhan, Senator David P.B. Norris, Senator Ivana Bacik, Senator Grace O'Sullivan, Senator Colette Kelleher, Senator Frances Black, Senator John Dolan, Senator Alice-Mary Higgins, and Senator Lynn Ruane

Progress of Bill and Bills amended in Dáil Éireann during the period May 2, 2019, to June 20, 2019

Coroners (Amendment) Bill 2018 – Bill 94/2018 – Report Stage – Passed by Dáil Éireann
European Parliament Elections (Amendment) Bill 2019 – Bill 9/2019 – Passed by Dáil Éireann
Gaming and Lotteries (Amendment) Bill 2019 – Bill 28/2019 – Committee Stage – Report Stage
Industrial Relations (Amendment) Bill 2018 – Bill 89/2018 – Report Stage
Land and Conveyancing Law Reform (Amendment) Bill 2019 – Bill 19/2019 – Committee Stage
Residential Tenancies (Amendment) (No. 2) Bill 2018 – Bill 140/2018 – Passed by Dáil Éireann

Progress of Bill and Bills amended in Seanad Éireann during the period May 2, 2019, to June 20, 2019

Adoption (Information and Tracing) Bill 2016 – Bill 100/2016 – Committee Stage
Civil Law (Presumption of Death) Bill 2016 – Bill 67/2019 – Committee Stage
Copyright and Other Intellectual Property Law Provisions Bill 2018 – Bill 31/2018 – Report Stage
Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Bill 2018 – Bill 92/2018 – Committee Stage
National Minimum Wage (Protection of Employee Tips) Bill 2017 – Bill 40/2017 – Passed by Seanad Éireann
Parental Leave (Amendment) Bill 2017 – Bill 46/2017 – Report Stage
Qualifications and Quality Assurance (Education and Training) (Amendment) Bill 2018 – Bill 95/2018 – Passed by Seanad Éireann

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

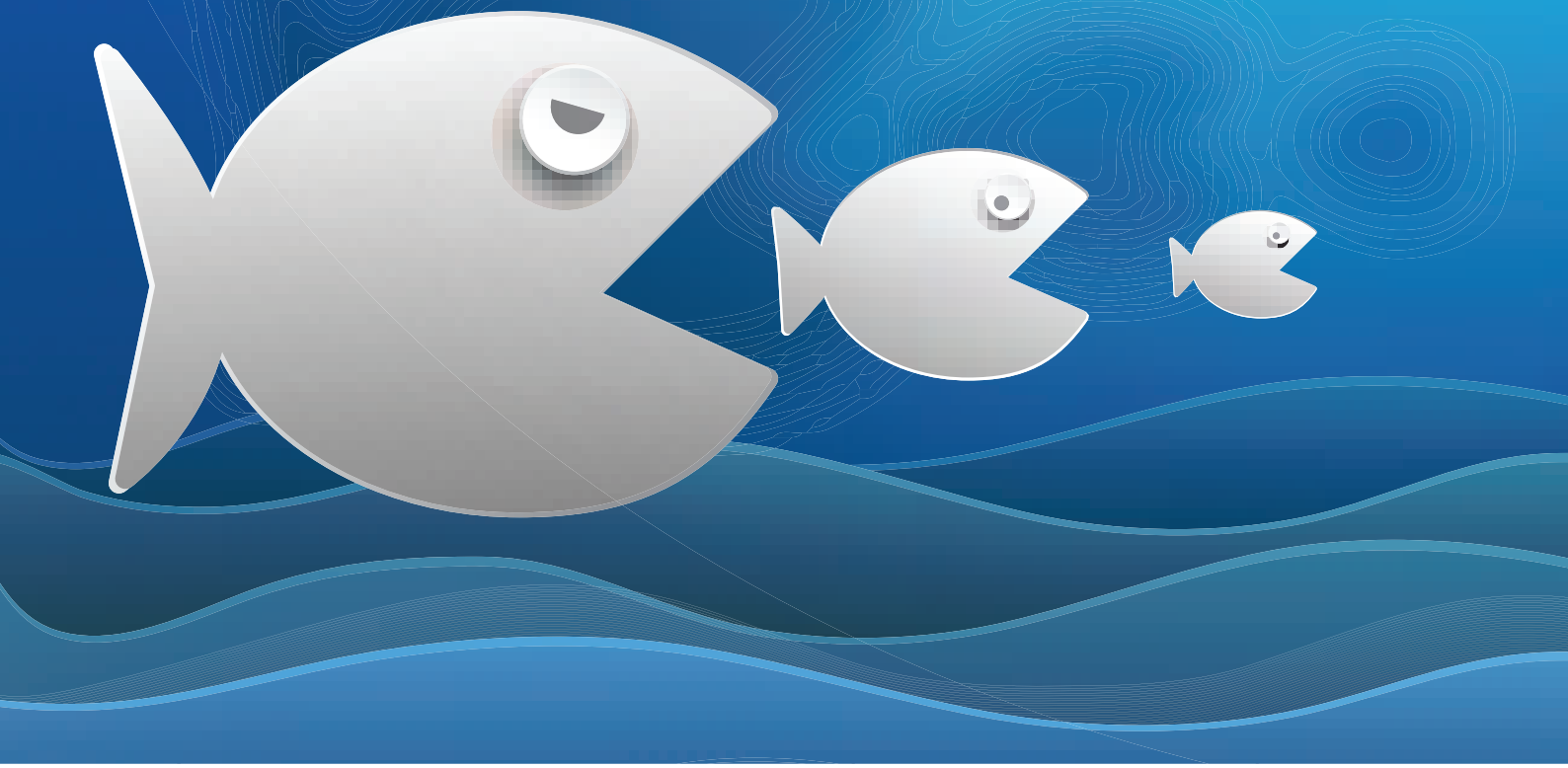
Bills and legislation:
http://www.oireachtas.ie/parliament/
http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Supreme Court Determinations – leave to appeal granted Published on Courts.ie – May 2, 2019, to June 20, 2019

Director of Public Prosecutions v Power [2019] IESCDET 109 – Leave to appeal from the Court of Appeal granted on the 28/05/2019 – (O'Donnell J., McKechnie J., Charleton J.)
Dwyer v The Commissioner of An Garda Síochána [2019] IESCDET 108 – Leave to appeal from the High Court granted on the 28/05/2019 – (Clarke C.J., MacMenamin J., O'Malley J.)
E R v Director of Public Prosecutions [2019] IESCDET 95 – Leave to appeal from the Court of Appeal granted on the 14/05/2019 – (O'Donnell J., McKechnie J., Charleton J.)

For up-to-date information please check the courts website:
http://www.courts.ie/Judgments.nsf/FrmDeterminations?OpenForm&l=en

Concurrent wrongdoers and the judgment in *Defender v HSBC*



Kelley Smith BL

The multi-billion dollar fraud case of Bernard Madoff is the background to this Irish case from the High Court.

In December 2008, the former chairman of the Nasdaq, Bernard Madoff, confessed that his asset management activities were "one big lie". It transpired that Mr Madoff had been operating the world's largest Ponzi scheme, for which he is now serving a 150-year sentence. Mr Madoff perpetrated his fraud by concurrently having a multiplicity of roles: broker; fund manager; and, custodian of the assets of managed funds. Mr Madoff's Ponzi scheme is the background to the High Court's judgment in *Defender v HSBC Institutional Trust Services (Ireland) DAC and Others*[1] ('the judgment'), which addresses issues relating to concurrent wrongdoers.

Background

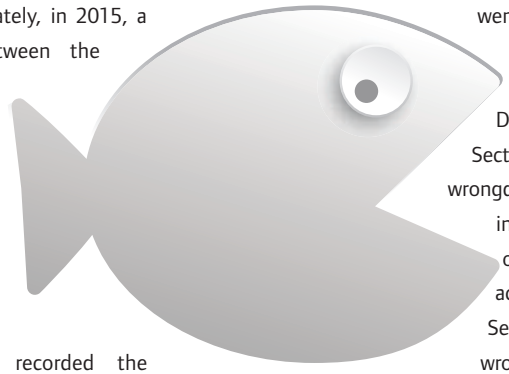
Pursuant to a custodian agreement, Defender, an investment fund, appointed an Irish entity, HSBC Institutional Trust Services (Ireland) Limited ('HSBC') as custodian of its cash and other assets. HSBC entered into a sub-custody agreement with Mr Madoff/his corporate entity ('Madoff') such that it would delegate custody of Defender's assets to Madoff. As a result, US$540 million of Defender's assets were held by Madoff.

US proceedings and settlement

Within days of Mr Madoff's arrest, Irving Picard was appointed as Madoff's trustee in bankruptcy ('the Trustee'). That appointment was pursuant to the Securities Investor Protection Act, 1970 ('SIPA'). In 2009, a claim was made in the Madoff bankruptcy proceedings on behalf of Defender.

In the course of his work, the Trustee instituted proceedings against Defender (and other funds) in order to recover certain redemptions that had been made

by Madoff to Defender. Ultimately, in 2015, a settlement was reached between the Trustee, Defender and others ('the Settlement Agreement'). As a result, the Trustee granted Defender an allowed claim in the Madoff liquidation ('the Allowed Claim') and agreed to pay distributions based on the Allowed Claim.



The Settlement Agreement recorded the settlement of:

(a) the Trustee's claim against Defender; and,

(b) Defender's claim in the SIPA process.

The Settlement Agreement also contained "very extensive"[2] releases.

Irish proceedings

Defender instituted proceedings in Ireland for the net sum of US$141 million. The net claim made by Defender took into account, *inter alia,* US$335 million, returned to Defender by the Trustee. Defender claimed that HSBC was negligent and in breach of duty in failing to monitor Madoff.

At the early stages of the trial, Twomey J. considered it appropriate to determine a discrete issue, namely, whether Defender's settlement with the Trustee meant that it could not pursue its claim against HSBC.

In order to determine that issue, arising from the Civil Liability Act, 1961 ('the 1961 Act'), the Court had to consider the following matters:

(a) whether HSBC and Madoff were concurrent wrongdoers;[3]

(b) was there a release or accord within section 17 of the 1961 Act; and,

(c) the hypothetical exercise to determine the blameworthiness of one concurrent wrongdoer.[4]

Concurrent fault under the 1961 Act

The issue of concurrent fault is dealt with in Part III of the 1961 Act. Section 11 provides that: "Two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person … for the same damage, whether or not judgment has been recovered against some or all of them…".

Defender argued that its claim was a customer claim in the liquidation, and as such, was a different claim from its cause of action against Madoff as custodian and so not for "the same damage". As a result, Defender contended that for the purposes of the 1961 Act, Madoff and HSBC were not responsible for the same damage, and so were not concurrent wrongdoers. Having reviewed the pleadings, Twomey J. rejected that contention.

The judge concluded that Madoff's fraud and HSBC's negligence were alleged by Defender to have led to the same damage (being the loss of the money invested in the Ponzi scheme). Accordingly, he found that Madoff and HSBC were concurrent wrongdoers.[5]

Identification under section 17(2) of the 1961 Act

What amounts to an accord?

In circumstances where the two parties were concurrent wrongdoers, the Court went on to consider the effect of the Settlement Agreement under the 1961 Act. That issue required an analysis of section 17 of the 1961 Act and, in particular, whether there was a release or accord between Defender and Madoff.

Section 17(2) provides that if there is no intention to release a concurrent wrongdoer indicated: "The other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made, in any action against the other wrongdoers, in accordance with paragraph (h) of subsection (1) of Section 35…".

Section 17 provides that if a release or accord with a concurrent wrongdoer does not indicate an intention to release the other concurrent wrongdoers, then the plaintiff's claim is reduced by the greatest of three amounts, being:

1. The amount of the consideration paid for the release or accord.
2. Any amount by which the release or accord provides that the total claim will be reduced.
3. The extent that the released wrongdoer would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers.

Having considered the judgments in *Arnold v Duffy*[6] and *Murphy v J. Donohoe Limited*,[7] the judge concluded that the Settlement Agreement amounted to an accord.

As noted above, section 17(2) provides that where one concurrent wrongdoer (Madoff) settles with the plaintiff (Defender), the other concurrent wrongdoer (HSBC) is not discharged by that settlement. Rather, the plaintiff (Defender) is identified with the person with whom the accord was made (Madoff) in the action against the other concurrent wrongdoer (HSBC) in accordance with Section 35(1)(h).[8]

Identification by means of deemed contributory negligence

Section 35 (1)(h) provides that for the purpose of determining contributory negligence:

> "where the plaintiff's damage was caused by concurrent wrongdoers, and after the occurrence of the damage the liability of one of such wrongdoers is discharged by release or accord made with him by the plaintiff, while the liability of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer, whose liability is so discharged".

Twomey J. concluded that Defender was: "deemed to be responsible for the acts of Madoff", and stated that:

> "The effect of S. 17(2) and S. 35(1)(h), therefore, is that in this case, Defender is deemed to be identified with the fraud of Madoff when this Court comes to determine the amount of any contribution that 'would be made' by HSBC, relative to the contribution to be made by Madoff, to the loss suffered by Defender".[9]

The hypothetical exercise under section 17(2)

Twomey J. went on to engage in a hypothetical exercise, under section 17(2),

to determine what amount Madoff would have been liable to contribute if Defender's total claim had been paid by HSBC. In that regard, the Court took Defender's case at its height and assumed that HSBC was guilty of negligence. The Court placed great weight on the undisputed fact that Madoff had engaged in a massive fraud as part of a Ponzi scheme.

The Court considered section 21(2) of the 1961 Act, entitled "Contribution in respect of damages", which states as follows:

> "(2)…the amount of the contribution recoverable from any contributor, shall be such as may be found by the Court to be just and equitable, having regard to the degree of that contributor's fault…".

Blameworthiness of Madoff

In the context of what is "just and equitable", Twomey J. referred to certain earlier Supreme Court judgments, including *O'Sullivan v Dwyer*[10] and *Carroll v Clare County Council*.[11] He concluded that the key factor is relative blameworthiness rather than the causative link.[12]

In analysing the position, the Court considered that it was obliged to assume that HSBC was negligent or otherwise vicariously liable for Madoff's wrongs. Somewhat curiously, the judge referred to the fact that HSBC had: "invested the sum of approximately US$1 billion of its own money, up to 25% of which it may not recover in the liquidation of Madoff".[13] As the test under section 21(2) was "relative blameworthiness", the Court considered it critical that one party was guilty of criminal wrongdoing and the other of mere negligence but was also a victim of the other's criminality.

Ultimately, the judge determined that what was relevant was the qualitative difference between the situation where "one wrongdoer is guilty of a criminal activity and the other is guilty of a civil wrong such as negligence", and compared that to the situation where there is an "action between two wrongdoers who are both guilty of a civil wrong or indeed, both guilty of a criminal wrong".[14] Twomey J. recognised that there was a qualitative difference between that situation and "some other form of concurrent wrongdoers, e.g., an architect and a builder who are both sued for negligence arising from substandard building on the other hand".[15]

The Court went on to place heavy emphasis upon a judgment of the Australian High Court of *Burke v LFOT Pty Limited*[16] relating to the doctrine of contribution. In that case, a solicitor was joined to proceedings by the seller of a business premises. The seller had misrepresented the quality of the tenant of the property.[17] This resulted in the buyer paying more for the property than its true value. The Court rejected the idea that someone who was guilty of a false representation could be entitled to a contribution from a solicitor who failed to make enquiries as to the tenant's solvency, which would have established that the representation was false.[18]

Twomey J. considered the following statement by McHugh J.[19] to be compelling:

> "It would be absurd to suggest that a person who stole money and was ordered to repay it could obtain contribution from a person who negligently failed to safeguard the money. And in substance, I do not think that there is any difference between that example and the present case".

In addition, the Court considered the long-established judgment of Costello J. in *Staunton v Toyota*,[20] where it was held that the primary concurrent wrongdoer was guilty of negligence and should be liable for 100%, even where there was a secondary concurrent wrongdoer, also guilty of negligence.

Twomey J. ultimately considered that a primary wrongdoer guilty of fraud and criminal conduct should not be entitled to a contribution from a secondary wrongdoer guilty of a civil wrong, such as negligence.

What dark place in the 1961 Act has been identified by the judgment?

In the preface to his 1951 book *Joint Torts and Contributory Negligence*[21] Glanville Williams referred to the "many dark places in this part of the law". The 1961 Act,[22] which Dr Williams had a hand in drafting, was introduced to reform the law on civil liability.[23] However, the 1961 Act has been the subject of judicial criticism. O'Donnell J. has referred to the 1961 Act as "an extremely complex provision which, while a significant advance in the law, is not so perfect a construction that there are not provisions in the Act, which do not fit comfortably together".[24] In a different case, he referred to the provisions relating to concurrent wrongdoers as "a mystery whose secrets have been revealed only to a few, and sections 16 and 17 and the relationship between the two provisions is particularly Delphic".[25] It appears that the judgment in *Defender* has revealed a further dark place in the 1961 Act.

In the Supreme Court decision in *Iarnród Eireann v Ireland,*[26] O'Flaherty J. approved a passage from McMahon and Binchy where the authors summarised three principles that underlie part III of the 1961 Act, as follows:

1. Subject to the rule that the plaintiff cannot recover more than the total amount of the damages he has suffered, the injured party must be allowed full opportunity to recover the full compensation for his injuries from as many sources as possible.
2. Concurrent wrongdoers should be entitled to recover fair contributions from each other in respect of damages paid to the plaintiff.
3. All matters relating to the plaintiff's injuries should, as far as possible, be litigated in one action.

The Supreme Court in *Iarnród Eireann* (and other judgments) has identified certain other relevant principles or provisions of the 1961 Act:

a. Where a deficiency arose to an innocent party, the Supreme Court concluded that any deficiency "… should be made by someone in default than that a totally innocent party should suffer anew".
b. The risk of non-recovery, whether through insolvency or otherwise, should be borne by a concurrent wrongdoer rather than the injured plaintiff. As noted by McMahon and Binchy: "…the risk of non-recovery is borne by a concurrent wrongdoer and not that of the injured plaintiff. This is exemplified in section 12 which states that 'concurrent wrongdoers are each liable for the whole of the

damage in respect of which they are concurrent wrongdoers', in essence, the '1% rule".[27]

c. Section 38(1) provides that where there has been contributory negligence on the plaintiff's part, he is to have a several judgment for such apportioned from part of his total damages as the court thinks "just and equitable", having regard to each defendant's degree of fault. Sub-section 2 goes on to provide that if, after taking reasonable steps, the plaintiff has failed to obtain satisfaction of any judgment in whole or in part, he shall have liberty to apply for secondary judgments. This provision has the effect of distributing the deficiency among the other defendants in such proportions as may be just and equitable.[28]
d. Section 17 seeks to avoid double recovery, but also to encourage out of court settlements.[29]

The outcome of the judgment runs counter to certain principles underlying the 1961 Act as follows:

a. the injured party, Defender, has not recovered the entirety of its damage – despite the fact that there are two concurrent wrongdoers deemed responsible for the same damage, Madoff and HSBC, Defender is at a loss of US$141 million;
b. section 17 is designed to avoid double recovery but also to promote settlement – clearly there is no double recovery here – instead, Defender is at a loss as a result of entering into a settlement with a concurrent wrongdoer;
c. Defender has suffered a deficiency in its recovery as a result of settling with the Trustee appointed as a result of Madoff's insolvency – despite the 1961 Act requiring assumptions as to: (a) negligence on the part of HSBC; and, (b) that HSBC was liable for the whole of the damage, HSBC pays nothing to Defender; and,
d. the outcome goes against the basic principle providing for an equitable division of the financial burden between wrongdoers.

The policy aims of the 1961 Act are referred to in the concluding paragraphs of the judgment. Twomey J. did not accept that the result of the judgment could be said to be unjust and inequitable to Defender.[30] Instead, the Court took the view that in entering the Settlement Agreement, Defender would, or should have been aware of the consequences of its settlement, namely, that it would be identified with Madoff.

Should a plaintiff settle with a concurrent wrongdoer?

A query arises as to whether a consequence of the judgment will be to discourage plaintiffs settling with one concurrent wrongdoer. Only time will tell. A plaintiff who refuses to engage with an offer of settlement by a concurrent wrongdoer, may face a claim of failure to mitigate loss. Pending clarification on appeal, the view may be taken that the facts of *Defender*, including the criminal context, are relatively narrow and so the usual level of apprehension around settling with a concurrent wrongdoer will simply continue.

References

1. [2018] IEHC 706. The judgment is under appeal.
2. Paragraph 41.
3. Paragraph 42.
4. A significant issue addressed in the judgment was whether New York law was applicable in determining the effect of the Settlement Agreement. That issue is not considered here.
5. Paragraph 48. This aspect of the judgment has been cited by Barniville J. in *AIB v O'Reilly* [2019] IEHC 151.
6. [2012] IEHC 368.
7. [1992] ILRM 378.
8. The Settlement Agreement specifically provided that the parties did not intend to provide any benefit by or under the agreement.
9. Paragraph 86.
10. [1971] IR 275.
11. [1975] IR 221.
12. Paragraph 99 of the judgment. However, Kenny J. in *Carroll v Clare County Council* noted that a jury was "to apportion the fault according to their view of the blameworthiness of the causative contributions to the accident and that it is to be measured and judged by the standards of conduct and care to be expected from a reasonable person in the circumstances".
13. Paragraph 102.
14. Paragraph 105.
15. Paragraph 105.
16. [2002] HCA 17. That judgment has not been followed in other jurisdictions: see the New Zealand Supreme Court judgment in *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] 1 NZLR 906.
17. The tenant was in arrears of rent and had received an incentive payment.
18. The solicitor, Mr Burke, had been found guilty of negligence.
19. At paragraph 59.
20. Unreported, High Court, Costello J., April 15, 1988.
21. Stevens & Sons Limited, 1951, as reprinted in 1998.
22. The Tortfeasors Act 1951 was replaced and elaborated upon by the 1961 Act.
23. Kerr. *The Civil Liability Acts* (5th ed.). 2017: p3.
24. *Hickey v McGowan* [2017] 2 IR 196 at 238.
25. *Cafolla v O'Reilly* [2017] 3 IR 209 at 233.
26. [1996] 3 IR 321.
27. A similar principle is reflected in section 14, which deals with judgments against concurrent wrongdoers.
28. As recognised by O'Flaherty J. in *Iarnród Eireann*. Section 38(2) was not referred to in the judgment.
29. As discussed by Charleton J. in *Haughey v J & E Davy* [2014] 2 IR 549; and *Sheehan v Talos Capital Limited* [2018] IEHC 361. That principle has been recognised by various authors, including Williams, McMahon and Binchy, and Kerr.
30. Paragraph 135.

Europe first?

Recent case law has thrown light on the issue of whether statutory bodies have the power to disavow national laws that conflict with EU law.

Marguerite Bolger SC

Katherine McVeigh BL

"To what extent does the principle of the primacy of EU law circumscribe the possibility for member states to apply (constitutional) rules concerning the attribution of jurisdiction in a particular field of law?".[1]

This was the question posed by EU Advocate General Wahl in *Minister for Justice and Equality v Workplace Relations Commission*.[2] This decision of the Court of Justice of the European Union (CJEU) on foot of a preliminary reference from the Irish Supreme Court has limited the procedural autonomy of member states by affirming that all organs of the State have jurisdiction to disapply national legislation that contravenes EU law. The CJEU disagreed with the decisions of the High Court and Supreme Court, and the opinion of its own Advocate General, which had all heavily endorsed the lack of any jurisdiction on a body, such as the Workplace Relations Commission (WRC), to disapply national legislation. In doing so, the CJEU emphasised the need to give effect to the primacy of EU law and not to allow it to be undermined by rules of national law.

Although the WRC case involved the functions and jurisdiction of the WRC, it affects many statutory bodies that have any EU law under their remit, such as the Environmental Protection Agency, the Tax Appeals Commission, the Valuation Tribunal, the Refugee Appeals Commissioner, and the Information Commissioner, as well as the District and Circuit courts. It could also affect regulatory bodies, where a person is seeking to rely on EU law rights, such as the Law Society and the Medical Council. These bodies will now have to consider whether the Irish legislation is consistent with any relevant EU law and, if not, whether it is appropriate for the body to exercise its jurisdiction to disapply the Irish legislation in favour of the EU law.

The journey to the CJEU

The WRC case commenced in the Equality Tribunal (now the Workplace Relations Commission) when three complainants sought to challenge their exclusion from An Garda Síochána's recruitment process on the basis that they had exceeded the statutory maximum age for recruitment of 35 years, which was laid down by national regulations.[3] They argued that this age limit constituted unlawful discrimination on grounds of age in contravention of the European Equality Framework Directive.[4]

The Minister successfully judicially reviewed the Tribunal on the basis that the Tribunal, a statutory body and not a court established under the Constitution, did not have jurisdiction to disapply national legislation. Charleton J. held that the Tribunal could not commence a hearing where it assumed a legal entitlement to disapply legislation, even secondary legislation, as this power was expressly reserved to the High Court under Article 34 of the Constitution. Even if it was found that the regulations were inconsistent with the Framework Directive and its implementing legislation, the Court held that the Tribunal could not make a binding legal declaration of inconsistency because it lacked jurisdiction to "overrule a statutory instrument". Charleton J.'s decision was subsequently endorsed by O'Neill J. in the High Court decision of *An Taoiseach v Commissioner for Environmental Protection and Fitzgerald*,[5] where the Court found that the Commissioner for Environmental Protection did not have the jurisdiction to consider the validity of regulations in light of a directive. O'Neill J. found that this jurisdiction was "unquestionably reserved under the Constitution to a court of law". He therefore refused to allow the notice party to rely directly on the direct effects of the Directive before the Commissioner, as he said that this required a notice party to proceed before the High Court in order to obtain the relief to which he claimed to be entitled.

Both decisions of the High Court were criticised by commentators at the time.[6] Nevertheless, the approach of the High Court in the WRC case was upheld by the Supreme Court, which, in a strongly worded decision, stated:

> "The alternative solution of extending a power, which would not otherwise arise, to a Tribunal, to disapply national legislation is wholly contrary to the national legal order and, certainly as a matter of national law, would not represent an appropriate solution to this problem".

Despite its strong views, the Supreme Court decided to refer the question of law to the CJEU on "whether a national body established by law in order to ensure enforcement of EU law in a particular area must be able to disapply a rule of national law that is contrary to EU law".[7]

Advocate General Wahl endorsed the views of the Supreme Court in concluding that an organ of a member state is only obliged to refrain from applying national legislation that is contrary to EU law when it is acting "within the judicial and/or administrative structure of the member state".[8]

The CJEU took a radically different approach from the High Court, Supreme Court and Advocate General in holding that there is an obligation on all statutory bodies of the member state to disapply national legislation that is contrary to EU law. The CJEU held that this was necessary to ensure the effectiveness and primacy of EU law:

> "If a body, such as the Workplace Relations Commission, entrusted by law with the task of ensuring that the obligations stemming from the implementation of Directive 2000/78 are implemented and complied with, were unable to find that a national provision is contrary to that directive and, consequently, were unable to decide to disapply that provision, the EU rules in the area of equality in employment and occupation would be rendered less effective".[9]

The CJEU confirmed the wide scope and application of the principle:

> "[The] duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State – including administrative authorities – called upon, within the exercise of their respective powers, to apply EU law".[10]

This exercise must be within the ambit of the powers of the body in question. Thus, in order to ensure that EU law is fully effective, a statutory body should not request or wait for a provision to be set aside by legislative or other constitutional means, but should move to disapply the competing national rule itself.

Irish statutory bodies' engagement with EU law

Prior to the WRC case, statutory bodies such as the WRC and the Tax Appeals Commission (TAC) have shown themselves willing to refer cases of their own volition to the CJEU for a preliminary ruling, without assistance from the High Court.[11] The Labour Court has actively engaged in making references to the CJEU over many years.[12] For example, a Labour Court reference to the CJEU confirmed its jurisdiction (and implicitly all other similar statutory bodies tasked with the application of EU law) to apply the direct effects of an unimplemented directive to a case before it, rather than having to refer the issue to the High Court, as had been contended for by the State.

All such statutory bodies can not only make references to the CJEU and apply the direct effects of EU law, but can now also go further and actively disapply national law that conflicts with the EU law that the body is required to apply, in order to reflect their now confirmed jurisdiction to do so.

Limitations on the interpretive obligation

The CJEU in *Smith v Meade*[13] held that the principle of interpreting national law in conformity with EU law has "certain limits" and stated:

> "The obligation on a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law that is *contra legem*…".[14]

That limitation was also identified by the High Court in the recent decision of *Recorded Artists Actors Performers Limited v Phonographic Performance (Ireland) Limited and Ors*,[15] where Simons J. confirmed that the interpretive obligation in the WRC case "is subject to the *contra legem* principle, i.e., a national court is not required to do violence to the words of the legislation". Simons J. also limited the application of the WRC case to directly effective European rules, but has indicated his intention to refer a question to the CJEU. The decision of the CJEU may be helpful in clarifying whether and, if so, to what extent, the obligation to disapply national law can be extended beyond the direct effects of EU law.

A further limitation arises from the concept of horizontal (versus vertical) direct effects. A dispute must be with an emanation of the State rather than between private persons in order to engage the jurisdiction of the statutory body to disapply national law that conflicts with EU law. In *Association de médiation sociale*,[16] the CJEU held that even a clear, precise and unconditional provision of a directive that seeks to enforce obligations on individuals cannot of itself apply in proceedings exclusively between private parties. More recently, the issue arose before the CJEU in *Smith v Meade*,[17] a case concerning an exclusion clause in a motor insurance policy that was incompatible with the Directive. The dispute was between two private persons and did not involve any emanation of the State. The CJEU held that a national court, hearing a dispute between private persons, which finds itself unable to interpret provisions of its national law in a manner that is compatible with a directive, is not obliged, solely on the basis of EU law, to disapply the provisions of its national law that are contrary to those provisions of that directive that fulfil all the conditions required for them to produce direct effects. The CJEU affirmed the principle that a directive cannot of itself impose an obligation on a person and, consequently, it cannot be relied upon against an individual, and that provisions of a directive do not apply to a dispute exclusively between private persons. The Court held that a national court must set aside national legislation that is contrary to EU law, but "only where that directive is relied on against a member state…"[18] and went on to state:

> "… a national court, hearing a dispute between private persons, which finds itself unable to interpret provisions of its national law in a manner that is compatible with a directive, is not obliged, solely on the basis of EU law, to disapply the provisions of its national law which are contrary to those provisions of that directive that fulfil all the conditions required for them to produce direct effect and thereby to extend the possibility of relying on a provision of a directive that has not been transposed, or that has been incorrectly transposed, to the sphere of relationships between private persons".[19]

A similar situation came before a UK court recently in *Colley v Shuker and Ors*,[20] where the legality of an exclusion clause in a motor insurance policy that was incompatible with the Directive was at issue. The Court interpreted the WRC case as not applying to private persons:

> "[The WRC case was] concerned with a claim against a member state in respect of directly applicable EU principles. In contrast, this case concerns a claim against an individual insurer in respect of rights derived from a Directive".[21]

Considering the principles set down in the WRC case, the UK court found that there was no obligation on, or power of, the court to disapply the UK national legislation and expressly relied on the CJEU decision in *Smith*.

A broader approach than judicial review

As a result of the WRC decision, any attempt to disapply national law by reference to a competing European law right must be asserted before the first instance decision-maker, rather than by way of an application to the High Court, as would have been done previously and in accordance with the views of the High Court and the Supreme Court in their decisions in the WRC case. The High Court application would likely have been done by way of judicial review.[22] Inconsistent national law can now be challenged within a statutory framework before the first instance decision-maker, a decision-making process that usually provides for a final appeal to the High Court on a point of law. This gives rise to the very real possibility that the decision-maker, whether it is at first instance, or ultimately the High Court on an appeal on a point of law, will enjoy a wider jurisdiction than would apply to the High Court in an application for judicial review. The wider jurisdiction of the High Court in dealing with a statutory appeal was recognised very recently by McGrath J. in *Minister for Employment Affairs and Social Protection v Labour Court and Mary Dunne*,[23] where he observed that in a statutory appeal where the High Court is asked to deal with the question of legal interpretation "the role of the court of necessity must be wider than that which it enjoys on an application for judicial review". He cited the decision of Baker J. in *Doyle v Private Residential Tenancies Board and Anor*,[24] where she stated:

> "When the Oireachtas provides a statutory right of appeal on a point of law, it must have intended some greater degree of court involvement with the decision than the perhaps more constrained approach taken by a court on a judicial review".

Conclusion

The WRC decision will have huge ramifications for the jurisdiction of national decision-making bodies that are applying national legislation that purports to transpose EU law. A striking example of its impact can be seen in the recent High Court decision in *K.S. (Pakistan) v The International Protection Appeals Tribunal and Ors; M.H.K (Bangladesh) v The International Protection Appeals Tribunal and Ors.*[25] Humphreys J. compared two cases heard before the International Protection Appeals Tribunal (IPAT): one that was heard before the WRC case – *H.M.K* – and one post the case – *S.S.*[26] The Tribunal in *H.M.K.* decided that it did not have the jurisdiction to disapply national regulations.

This was in stark contrast to the decision of the Tribunal in *S.S*, which held that it had such jurisdiction. Humphreys J., while exercising his discretion under Article 267 TFEU in deciding to refer questions to the CJEU, highlighted the differing outcomes of these two cases and, in doing so, highlighted the significance of the WRC case. The judge noted:

> "Pending the [WRC] CJEU judgment itself, the tribunal was of the opinion [in the *H.K.M*. case] that it was a matter for the courts on judicial review to consider if necessary any disapplication of the 2018 regulations. However, the judgment of the CJEU … held that the obligation to apply EU law in preference to national law was owed by all organs of State. Thus in a separate case to the present proceedings, that of *S.S.* (IPAT, 21st December, 2018), the tribunal decided that it had jurisdiction to disapply the 2018 regulations, and indeed did so in that case. Whether that approach was right or wrong is really what falls for decision now. Apart from one other case, it appears the tribunal has not made any other decisions based on the *S.S.* approach".

The potential impact of the decision for the operation of the WRC is particularly significant. Adjudication officers can (and may even be obliged to) now set aside legislation by reference to potentially complex issues of European law. An adjudication officer sitting in the inquisitorial-style WRC must now examine EU law, some of which can be very complex, to ensure that national legislation complies with such law.

A vast amount of the employment legislation over which the WRC has jurisdiction has a significant EU component and reflects not just a European regulation or directive but also complex jurisprudence from the CJEU. This exercise must be carried out even if the parties do not advance arguments on an EU point. The adjudication officers are tasked to do this, notwithstanding that there is no requirement for them to have any legal qualifications. Further resources are likely to be needed to ensure that Ireland is complying with its EU obligations and that the State fulfils its commitment that the WRC would provide "legally robust" decisions in a "world-class" service, which is "simple to use, independent, effective, impartial and cost-effective".[27]

A leading Irish academic on European law, Dr Elaine Fahey, observed some years ago how statutory decision-makers had, at first instance, "generated a vast body of case-law in this jurisdiction and comprise a strange series of cases, where key doctrines of EU law were misapplied or applied most restrictively, generating several preliminary references to the Court of Justice from the Irish courts…".[28] This did not suggest any great confidence in the ability of those decision makers to deal with potentially complex issues of European law.

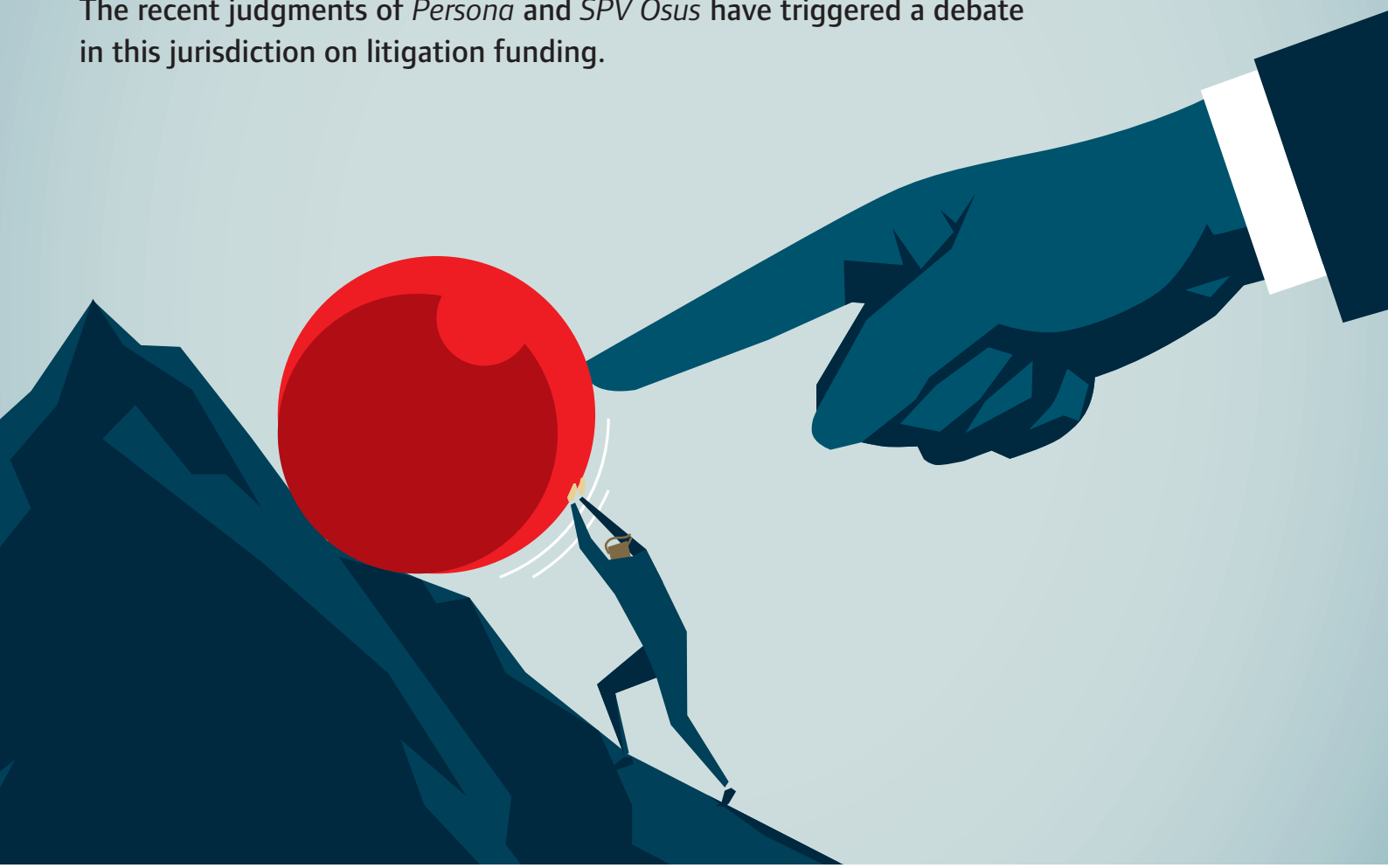
If Ireland is to ensure compliance with EU law, the resources of the statutory bodies that will have to consider the consistency of national legislation with EU law will need to be re-examined. The obligations that now fall on these bodies were unlikely to have been in the mind of the Oireachtas when it decided to permit the appointment of decision makers who do not have a law qualification.

References

1. Para. 1 of Opinion of Advocate General Wahl, dated September 11, 2018.
2. [2009] IEHC 72; [2017] IESC 43; Case C-378/17.
3. The Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2014 (S.I. No 749 of 2004).
4. Council Directive establishing a general framework for equal treatment in employment and occupation 2000/78/EC of November 27, 2000.
5. [2011] 1 ILRM 508.
6. See, for example, Bolger, Bruton and Kimber, *Employment Equality Law* (Roundhall Thomson Reuters, 2012) at paragraph 2.11, which referred to a difficulty in understanding the reluctance of the High Court to recognise the jurisdiction and even the possible obligation of the Equality Tribunal to have regard to the relevant provisions of the European Directive in determining a claim brought before it.
7. Para. 1 of Case C-378/17.
8. Para. 56.
9. Para. 48 of Case C-378/17.
10. Para. 38 of Case C-378/17.
11. For example, in *National Roads Authority v Revenue Commissioners*, the TAC made a reference to the CJEU in relation to the provisions of the Value Added Tax Act 1972 and Council Directive 2006/112/EC.
12. *Hill and Stapleton v Revenue Commissioners and the Department of Finance* (Case C-243/95; [1998] ECRI-3739); *McKenna v North Western Health Board* case (Case C-191/03; [2005] ECRI-07631); *Z v Government Department and the Board of Management of the Community School* (Case C-363/12); and, *Parris v Trinity College Dublin and Ors* (Case C-443/15).
13. Case C 122/17, EU:C:2018:223.
14. Para.40 C-122/17.
15. [2019] IEHC 2.
16. Case C-176/12.
17. Case C 122/17, EU:C:2018:223.
18. Para.45 C-122/17.
19. Para.49 C-122/17.
20. [2019] EWHC 781 (QB) (28 March 2019).
21. Para. 36.
22. For example, the recent decision of *Glegola v Minister for Social Protection* [2018] IEFC 65, which found that the Irish legislation on employers' insolvency had failed to properly transpose the EU Directive, was by way of an application for judicial review.
23. Decision of July 4, 2019.
24. [2015] IEHC 724.
25. [2019] IEHC 176.
26. IPAT, December 21, 2018.
27. WRC Statement of Strategy 2016-2018.
28. Fahey. *EU Law in Ireland*. Clarus Press, 2010.

The case for litigation funding

The recent judgments of *Persona* and *SPV Osus* have triggered a debate in this jurisdiction on litigation funding.



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Paul Gardiner SC recently set out the arguments – as identified by O'Donnell J. in *SPV Osus*[1] – against litigation funding (and assignment of actions) in the June edition of *The Bar Review*. Meanwhile, the Irish Society for European Law and the EU Bar Association (EUBA) will launch their joint report on representative actions and litigation funding across multiple jurisdictions this coming October. This report originated with a conference on private competition damages claims in October 2017. It assesses whether the lack of either representative actions or litigation funding mechanisms in Ireland is a barrier to litigation, and considers the comparative approaches of a number of other jurisdictions.

The aim of this article is to make a small contribution to this debate, by identifying the primary arguments in favour of litigation funding. In that regard, this article will necessarily provide the perspective of only one side of the debate.

Persona and *SPV OSUS*

In summary, in both *Persona*[2] and *SPV Osus*, the Supreme Court found that arrangements proposed by plaintiffs to pursue litigation – third-party funding in *Persona*[3] and an assignment of a claim in *SPV Osus* – were contrary to public policy. In *Persona*, Denham C.J., giving judgment for the Court, held that third-party funding was unlawful as giving rise to champerty. In *SPV Osus*, O'Donnell J. observed that assignments of a right to litigate are void as savouring of champerty or maintenance.[4]

The underlying *Persona* proceedings concerned a challenge to the award of the second mobile GSM licence, the subject matter of the Inquiry into Payments to Politicians and Related Matters (known as the Moriarty Tribunal) and described by Hardiman J. in the Supreme Court in an earlier judgment as

"absolutely unique, without precedent or parallel in the ninety-year history of the State".[5] Meanwhile, at issue in *SPV Osus* was assignment of a claim to the plaintiffs, which was designed and intended to permit onward transactions.[6] The claim arose from the collapse of the Madoff business in 2008 due to a long-running and large-scale Ponzi-type fraud.[7]

In both cases, the Supreme Court made it clear that legislation would be the preferred mechanism for achieving any change in the legal position.

Litigation funding

A useful definition of litigation funding is provided by the United Kingdom's self-regulator, the Association of Litigation Funders (ALF), as follows:

> "[W]here a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money and nothing is owed by the litigant".

"It is one thing for lawyers to be prepared to take on relatively short litigation at the risk that they will not be paid unless they are successful".[17] Certainly, it is difficult to expect complex and lengthy cases to be pursued on a no foal, no fee basis.

Access to justice

The first, and most oft-cited, argument in favour of litigation funding is that lawful funding arrangements are often necessary to ensure access to justice. In this regard, it has long been recognised that maintenance and champerty may interfere with that access. For example, in *O'Keeffe v Scales*, Lynch J. observed that:

> "While the law relating to maintenance and champerty therefore undoubtedly still subsists in this jurisdiction, it must not be extended in such a way as to deprive people of their constitutional right of access to the courts to litigate reasonably stateable claims".[8]

Similarly, in *Greenclean No 2*,[9] in relation to after the event (ATE) insurance, Hogan J. concluded that while ATE insurance savoured of champerty, the position had to be viewed and modified in light of the modern principles of:

> "the advent of legal aid, trade unions and community and voluntary groups. Even more importantly, access to justice is, of course, a constitutional fundamental having regard not only to Article 34.1 of the Constitution, but also having regard to leading cases articulating this principle ….".[10]

In *Greenclean (No 1)*, Hogan J. recognised that ATE "may well assist many in securing access to justice in a manner to which they might not otherwise have ready access".[11] Courts elsewhere have also relaxed the prohibition against maintenance and champerty in recognition of the need to ensure access to justice and interpreted the doctrines in light of modern public policy. In other jurisdictions that have deemed third-party funding to be permissible, the right of access to justice has played an important, and indeed fundamental, role in the judicial analysis.[12] For example, the New Zealand Supreme Court observed in *Saunders v Houghton* that "the interests of justice can require the court to unshackle itself from the constraints of the former simple rule against champerty and maintenance".[13]

In similar terms, in *Gulf Azov*, Lord Philips observed in the English Court of Appeal that "[p]ublic policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation".[14]

In *Persona*, while for Clarke J. (as he then was) the choice of solution for litigation funding was "very much a matter of policy" and not, at least initially, for the courts, the learned judge did indicate that he had serious concerns about access to justice in this jurisdiction.[15] In his concurring judgment in *SPV Osus*, Clarke C.J. also repeated his concerns about the "increasing problem with access to justice", although he reiterated his view that legislative intervention was required.[16]

One response to access to justice concerns of course is that litigation could be pursued on a no foal, no fee basis. This option was posited by Denham J. in *Persona*, who also suggested that "an alternative route may be found, whereby the litigation would cost less". However, Clarke C.J. recognised the problem with this proposal, noting that: "It is one thing for lawyers to be prepared to take on relatively short litigation at the risk that they will not be paid unless they are successful".[17] Certainly, it is difficult to expect complex and lengthy cases to be pursued on a no foal, no fee basis.

There is also a prejudicial impact for a plaintiff with a legitimate claim, who is not able to proceed with litigation. In this regard, a particular feature of *Persona* – which the majority of the Court acknowledged but did not regard as persuasive – was the "concern that the defendants and third party who vigorously opposed the plaintiffs' motion are beneficiaries if the case does not proceed".[18]

Moreover, from a policy perspective, as was observed in *Massai Aviation Services v Attorney General of the Bahamas*,[19] it is undesirable for a defendant to have a fortunate escape through the impecuniosity of the plaintiff.

Freedom of contract

Second, and also important, is the constitutional right to freedom of contract (also raised in *Persona*). This is a point that was emphasised by the Supreme Court of Appeal of South Africa in *Price Waterhouse Coopers Inc v National Potato Co-operative*, Southwood A.J.A. stating:

> "In my view, upholding agreements between a litigant and a third party who finances the litigation for reward is also consistent with the constitutional values underlining freedom of contract. Cameron JA

summarised the position in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at [94]–'[T]he constitutional values of dignity, equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint … contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity'" (case citations omitted).[20]

European influence

Third, it is important to consider the influence of the European Court of Human Rights (ECtHR) and EU law. While there may not be any clear statement under the Convention in respect of litigation funding, the case law under the Convention and the Charter could certainly be interpreted to support recognition of litigation funding.

It has been a long time since the ECtHR concluded that a lack of a civil legal aid scheme violated Mrs Airey's Article 6 rights to a fair trial.[21] Meanwhile, more recently, in *DEB Deutsche*, the Court of Justice of the European Union (CJEU) ruled that legal persons could potentially be entitled to legal aid, if the alternative was to undermine the very core of their right of access to the courts.[22]

Inconsistencies

Fourth, the rulings in *Persona* and *SPV Osus* produce certain inconsistencies in the law in this jurisdiction. In both *Persona* and *SPV Osus*, as noted above, the Court accepted that a 'no foal, no fee' arrangement and a shareholding acquisition would not violate the prohibition on maintenance and champerty. However, it is not at all apparent why, if litigation funding is prohibited, these forms of funding are not also considered to be contrary to the objectives of the doctrines of maintenance and champerty.

The legitimacy of no foal, no fee has been recognised for some time in this jurisdiction. In *LM v Garda Commissioner*, O'Donnell J. referred to the advancement of claims often being dependent on "the willingness of a legal team to advance a claim on the hazard that if the claim failed they will receive no payment".[23] Other cases implicitly accepting no win, no fee agreements include *McHugh v Keane*,[24] *Synnott v Adekoya*[25] and *CA v Minister for Justice and Equality*.[26]

Yet, it is in fact arguable that the doctrines of maintenance and champerty should apply with greater rigour to agreements with lawyers (including no win, no fee agreements for normal costs only, as opposed to a percentage of the damages recovered), given their central role in the litigation and ability to control it. This can be seen in English case law, and for example in *R*

(Factortame) (No 8), it was noted that "[t]here is good reason why principles of maintenance and champerty should apply with particular rigour to those conducting litigation or appearing as advocates".[27] In fact, the common law position in England has cast doubt on the lawfulness of any contingency fee agreement, including a no win, no fee agreement,[28] other than those in compliance with Section 58 of the Courts and Legal Services Act 1990 (as substituted by the Courts and Legal Services Act 1999).

In *Persona* and *SPV Osus*, as noted above, the second legitimate method of funding recognised by the Court arises where the funder acquires shares in the legal entity that enjoys the claim. In both *Persona* and *SPV Osus*, this was explained as a consequence of the separate legal personality of joint stock companies.[29]

However, a question arises here too as to why a shareholding acquisition should also be regarded as acceptable. The possibility arises for a company to transfer all its assets save for the relevant litigation to another legal entity, for the company to then be purchased by the funder, and for the funder, in its role as (possibly 100%) shareholder to have at least some capacity to influence the litigation (in the course of the general shareholder entitlement to have an impact on major matters affecting the profitability of the company). It is at least arguable that such an arrangement would trigger the policy concerns underlying the prohibition on maintenance and champerty.

It is also curious that these arrangements are considered to be preferable to a litigation funding agreement, like that in *Persona*, according to which the funder had no capacity to exercise control over the litigation, the agreement in *Persona* including the following provision:

> "The agreement provides that HF3 will act in accordance with the Code of Conduct for Litigation Funders; that HF3 is entitled to information but cannot interfere with the litigation; that HF3 cannot withhold consent to change in the plaintiffs' counsel; that the decisions whether to prosecute, compromise, continue or discontinue the proceedings are at all times within the exclusive control of the plaintiffs; that the role of HF3 is exclusively that of a funder; that the funder will observe confidentiality; that the funder will not take any steps that cause or are likely to cause the funded party's solicitor or barrister to act in breach of their professional duties; and that the funder will not seek to influence the plaintiffs' solicitor or barrister to cede control to the funder".[30]

Overstating the risks?

Fifth, the risks created by litigation funding mechanisms, while of course material and requiring to be taken seriously, can at times be overstated.

Regrettably, the risk of suborning witnesses or interfering with the course of litigation can arise even in the absence of litigation funding. In *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* – an apparently mundane procurement case – it was discovered during the course of the proceedings that the applicant had promised witnesses a bonus if it won, while the contracting authority appeared to have destroyed its evaluation notes.[31]

In any event, it is readily possible to put arrangements in place to control conduct on the part of funders. Third-party funding is available in England and Wales but is governed by a code of conduct that is self-regulated by the ALF. In 2008, Lord Justice Jackson was appointed by the Master of the Rolls to carry out a review into the costs of civil litigation. In Lord Justice Jackson's Final Report[32] (The Jackson Report), he made a number of recommendations in relation to third-party funding, including that a satisfactory voluntary code should be drawn up to which all litigation funders would subscribe. Following on from the Jackson Report, the 'Code of Conduct for Litigation Funding' was brought into effect in November 2011. The initial code brought in on foot of the Jackson Report has been updated and the current version is the Code of Conduct for Litigation Funders (January 2018). The Code of Conduct for Litigation Funders provides general standards to which funder members of the ALF must adhere and aims to counter the concerns set out in the Jackson Report. The Code of Conduct provides, in summary:

- requirements that funders maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months (§9.4);
- requirements that funders must behave reasonably and may only withdraw from funding in specific circumstances; where there is a dispute about termination or settlement, a binding opinion must be obtained from an independent QC, who has been either instructed jointly or appointed by the Bar Council (§13.2);
- requirements that funders will not seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder (§9.3);
- requirements that funders take reasonable steps to ensure that the funded party shall have received independent advice on the terms of the litigation funding agreement prior to its execution, which obligation shall be satisfied if the funded party confirms in writing to the funder that the

funded party has taken advice from the solicitor or barrister instructed in the dispute (§9.1); and,

- an important aspect of the Code of Conduct is that it provides that the funder consents to the complaints procedure as maintained by the ALF (§15).

Brexit

Sixth, in *Persona*, the plaintiffs referred to Ireland's place on the international stage, and pointed to the International Financial Services Centre, the Arbitration Act 2010, and to international trade.[33] With Brexit, there has been an increased focus on Ireland's role in this regard. However, litigation funding is a feature of most complex international litigation and arbitration. Thus, insofar as Ireland wishes to attract litigation and arbitration here, it will be competing with English language commercial courts in the Netherlands and Paris, and in circumstances in which the laws of Germany, France and the Netherlands are significantly more tolerant of litigation funding and assignments than here.

Conclusion

In *Liebermann v Morris*, Jordan C.J. stated:

> "…the phrase 'public policy' appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest … public policy is not, however, fixed and stable. From generation to generation, ideas change as to what is necessary or injurious, so that 'public policy is a variable thing. It must fluctuate with the circumstances of the time': *Naylor, Benzon and Co v Krainische Industrie Gesellschaft* [1918] 1 KB 331 at 342."[34]

It is suggested that it is time to reconsider public policy in this jurisdiction insofar as relates to litigation funding.

References

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3. For an excellent analysis of *Persona*, see: Biehler, H. Maintenance and champerty and access to justice – the saga continues. *Irish Jurist* 2018; 59.
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5. *Comcast International Holdings Incorporated v Minister for Public Enterprise* [2012] IESC 50.
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8. 1998] 1 IR 290 (SC) 295.
9. *Greenclean Waste Management Ltd v Leahy & Co Solicitors (No 2)* [2014] IEHC 314.
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11. *Greenclean (No 1)* [2013] IEHC 74 [2].
12. See, e.g., the judgment of the Supreme Court of Appeal of South Africa in *Price Waterhouse Coopers Inc v National Potato Co-operative* [2005] 2 LRC 150 ([24], [43]-[44]); the New Zealand Court of Appeal in *Saunders v Houghton* [2010] 3 NZLR 331, [2009] NZCA 610 ([28]-[29]); the Royal Court of Jersey judgment in *Barclays Wealth Trustees (Jersey) Ltd v Equity Trust (Jersey) Limited* [2013] JRC 094 ([51], [57], [63]); the Ontario Superior Court of Justice decision in *Dugal v Manulife Financial Corporation* [2011] ONSC 1785 ([33]); the Supreme Court of Bermuda's judgment in *Stiftung Salle Modulable v Butterfield Trust (Bermuda) Ltd* (February 21, 2014) ([328]-[329]; the English Court of Appeal judgment in *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292 ([54]) and the English High Court judgments in *Arkin v Borchard Lines Ltd* ([2003] EWHC 2844 (Comm); and, the Hong Kong Court of Appeal judgment in *Unruh v Seeberger* [2007] HKCFA 9 ([95]).
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15. *Persona*, Clarke J., [3.7].
16. *SPV Osus*, Clarke C.J., [2.1] – [2.5].
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18. *Persona*, Denham C.J., [54].
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20. [2005] 2 LRC 150, [44].
21. *Airey v Ireland* [1979] 2 EHRR 305. See also *McVicar v United Kingdom* (2002) 35 EHRR 22; *Steel v United Kingdom* (2005) 41 EHRR 22; *Jordan v United Kingdom* (2003) 37 EHRR 2; and, *Anakomba Yul v Belgium* (App No 45413/07) (March 10, 2009).
22. Case C-279/09 *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* EU:C:2010:811. See also Case C-156/12 *GREP GmbH v Freistaat Bayern* EU:C:2012:342.
23. [2015] IESC 81, [28].
24. HC (December 16, 1994).
25. [2010] IEHC 26.
26. [2015] IEHC 432.
27. [2003] QB 381, [60]. See also: *Sibthorpe v London Borough of Southwark* [2011] EWCA Civ 25; *Wallersteiner v Moir (No 2)* [1975] QB 373; and, *Awwad* [2001] QB 570.
28. See, in particular *Wallersteiner*, and Awwad and Whyte, 'The Legal Status of 'No Foal, no Fee' Agreements'. *The Bar Review* 2012; 61.
29. *SPV Osus*, Clarke C.J., [2.8] and O'Donnell J, [78].
30. *Persona*, Denham C.J., [19(iii)].
31. See, e.g., *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988, [59] and [207].
32. https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.
33. *Persona*, Denham C.J., [14(vi)].
34. (1944) 69 CLR 69.

Protecting the vulnerable

The Bar of Ireland has made a submission to the O'Malley review, 'The Protection of Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences'.

Tony McGillicuddy BL

The Council of The Bar of Ireland recently provided submissions to a working group tasked with reviewing the adequacy of current arrangements for the protection of vulnerable witnesses in the investigation and prosecution of sexual offences. The working group, chaired by Tom O'Malley BL, was established by the Minister for Justice last year and is expected to report to the Minister shortly. The Council welcomed the opportunity to contribute to this process as the Bar has an important role in ensuring that the criminal justice system provides a fair trial for complainants, accused persons and witnesses, and that any measures that seek to improve the position of those who give evidence in criminal trials do not have the effect of jeopardising the constitutional right to a fair trial of the accused. Rather than seeing these positions to be in conflict, the legal system and society generally must work to ensure that both objectives are met by appropriate means and resources. This principle remains to the fore of Council's submissions.

Anonymity

Among Council's recommendations are to preserve the present state of Irish law on anonymity of accused persons during the criminal process, which provides that accused persons may be named if they are convicted, albeit subject to statutory restrictions to protect the complainant's privacy. Council believes that this provides appropriate protections for the various public interests involved. There have been some regrettable lapses in court reporting in recent times, and much of the commentary on social media appears contemptuous of the requirements of a fair trial. New primary legislation to deal with contempt of court and the use of social media for court reporting is strongly urged, while safeguarding accurate and fair reporting of court proceedings in an open, democratic society.

More judges

A reduction in the time period between charge and trial, so often criticised by complainants and accused persons with good reason, is of paramount concern. The Council supports the concept of pre-trial hearings to deal with certain applications. However, concurrent with any proposal to introduce pre-trial hearings is the pressing need to provide greater judicial resources. The reasonable objective of holding trials by 12-14 months at the latest from the time of charge will only come about with the appointment of additional judges to the trial courts. Pre-trial hearings simply will not work to alleviate delays unless there is an increased number of judges to hear such applications and trials thereafter.

Disclosure

Disclosure is critical in trials of sexual offences and is, sadly, the most difficult issue for legal practitioners, both prosecuting and defending. Complexities associated with the volume of material, the difficulty in navigating the (newly) enacted provisions in this area, and the overriding consideration to ensure that a fair trial is achieved, is compounded by a lack of financial resources, personnel and expertise. While improvements have been made, the Council is concerned that the issue is not being approached in a principled, thematic and organised fashion, and the risks of a miscarriage of justice are increased in such circumstances. The 2014 Law Reform Commission Report on Disclosure and Discovery in Criminal Cases ought to be revisited. Moreover, the number of widely reported failures in the disclosure process leading to the collapse of a number of criminal trials in the UK resulted in a series of inquiries, from which this jurisdiction can take further learnings.

Vulnerable witnesses

Support for vulnerable witnesses is an absolute priority. Promoting the adaptation of adversarial skills to achieve optimal outcomes while ensuring maximum protection for vulnerable witnesses forms a key part of the Council's regular Advanced Advocacy training courses. The Council recommends that the use of intermediaries be enhanced and expanded to assist those whose understanding and range of expressions may be limited, but is of the view that any proposal to pilot pre-recorded cross-examination of witnesses should firstly be preceded by careful consideration of the issues arising from the UK experience, which is currently in pilot phase. The Council also endorses the recommendation of Rape Crisis Network Ireland that special measures afforded to vulnerable witnesses during court proceedings should extend to vulnerable accused persons. Vulnerability is not confined to prosecution witnesses, although it might require separate consideration with additional research.

Consolidate

Finally, the law on sexual offences should be consolidated into one or two acts of the Oireachtas. The current state of the statute book of sexual offences is incomprehensible to the general public, difficult for Gardaí and other State agencies to navigate, and makes trials difficult for the lawyers involved. Such consolidating legislation should be a top priority for the Oireachtas if it is to ensure the proper administration of justice.

To read the full submission, visit www.lawlibrary.ie.

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