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REVIEW
Journal of The Bar of Ireland

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OF IRELAND
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Volume 24 Number 5
November 2019

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Change continues apace

As the new legal year commences, there are a number of developments that members need to be aware of.

A warm welcome back to all colleagues, and a special welcome for our new members, 82 in total, who commenced practice on October 7.

New developments

From October 7, the Legal Services Regulatory Authority began to receive complaints in respect of the legal profession, both barristers and solicitors. This is a welcome development. We have been working closely with the Authority to ensure that the transition to the new regulatory arrangements is as smooth as possible. It will no doubt be a steep learning curve for the new Authority, and for any barrister who may find themselves interacting with it. Dara Hayes BL sets out a brief overview of the changes in this edition, and I urge all members to familiarise themselves with the new arrangements and attend the information sessions that are being organised over the next few weeks. The Council of The Bar of Ireland is also reviewing how we can provide appropriate support for members in their interactions with the LSRA in the future.

Judicial Council

The establishment of a Judicial Council is another welcome development that will take place in this legal year. I wish to echo the points highlighted by the Chief Justice in his statement on the opening of the legal year. It is crucial that the necessary resources are put in place to ensure that the Judicial Council can properly fulfil its role. In this regard, I was pleased to note that the Government provided for an allocation of €1m in Budget 2020 for the Judicial Council. The long-awaited new and additional appointments to the Court of Appeal have also taken place, and will have a positive impact on access to justice, in particular for those litigants who will have their hearings brought forward to an earlier date than previously thought. An immediate consequence arising from these appointments is the creation of a number of vacancies in the High Court and it is imperative that those are filled. There remains an acute shortage of judges and registrars in the District, Circuit and High Courts.

Leading international legal services

Our efforts to promote Ireland as a leading centre globally for international legal services will pick up pace this year as the Government establishes the Implementation Group to lead the way in promoting the use of Irish law and legal services in contracts, transactions, and arbitral disputes. Former Taoiseach and Ambassador of the European Union to the United States, Mr John Bruton, has been appointed as Chair of the Implementation Group and I look forward to working with him on this important initiative. The project is an opportunity to support existing foreign direct investment and generate increased employment in the legal services and related sectors, and thereby further increase the contribution of the legal sector to our economy. Our profession is increasingly in demand globally for our specialist advocacy and advisory skills. Our expertise as specialist court advocates has seen a growth in the popularity of barristers as a choice for clients in international arbitration and dispute resolution. The Bar of Ireland, in conjunction with the Law Society and IDA Ireland, are committed to the development of a strategy to maximise this opportunity in partnership with the Government.

Bar of Ireland survey

Members will by now have had the opportunity to read the results of our survey in relation to the well-being of members at the Bar. The survey has revealed interesting insights into members' attitudes and perceptions across a variety of areas including workplace happiness, collaboration and collegiality, physical and mental well-being, experience of stress, work-related concerns and unfortunately, but not surprisingly, some negative experiences also. I was encouraged to see that there was generally a good awareness of the types of supports available to members, with 88% stating that they had an awareness of one or more of the supports made available by The Bar of Ireland. It is clear, however, that we have some work to do to ensure that they are as accessible and relevant as possible for those who are most in need – female and younger members of the Bar in particular. The Council is committed to raising awareness and addressing the cultural issues raised through the survey. After all, to ensure the well-being of our members is to ensure the long-term vitality of the profession and ultimately the interests of the clients that we serve.

I encourage all members to keep abreast of important updates and events through our weekly e-zine, *In Brief*. I, in my capacity as Chairman, remain available to speak with any member on any issue of concern along with my colleagues on Council. Our contact details are accessible on our website.

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

Brexit and balance

It is difficult to escape the spectre of Brexit. And we can offer no respite in this regard. In this edition, we drill down into the practical effect of the UK departure from the Union, particularly in the area of crime and human rights. Our writer explains the likely difficulties with the enforcement of European arrest warrants and all-island police investigations. In the absence of alternate mechanisms, Brexit will have a significant and immediate impact in relation to cross-border investigations into the activities of organised criminal gangs.

Continuing with the EU theme, we also examine attempts to invoke consumer-oriented EU directives on consumer credit and unfair terms in consumer contracts in this jurisdiction. The conclusion is that such attempts have been remarkably unsuccessful in Ireland to date, compared with the corresponding success of litigants in other EU jurisdictions.

Part 6 of the Legal Services Regulation Act 2015 has now come into effect, and the LSRA's disciplinary function has been commenced. We detail how these new provisions will impact on barristers in practice, particularly in regard to the handling of complaints against practitioners.

Finally, the results of a recent survey, Balance at the Bar, conclude that most members are ostensibly healthy and happy, and enjoy a culture of collegiality. However, not surprisingly, the survey also points to members experiencing stress, mental health issues, and difficulties recovering fees. The experiences at the Irish Bar appear to be remarkably similar to those in other jurisdictions.

Eilis Brennan SC
Editor
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IACBA launch event

The membership launch event of the new Immigration, Asylum and Citizenship Bar Association (IACBA) took place in the Gaffney Room on July 24. David Conlan Smyth SC and Aoife McMahon BL delivered two excellent presentations. Membership is open to all members of the Law Library at www.iacba.ie, where CPD papers are also available. The IACBA's Annual Conference will take place on Friday, November 29, 2019.

At the IACBA launch (from left): Denise Brett SC, Chair; Aoife McMahon BL; and, David Conlan Smyth SC.

Advanced Advocacy

Irish and international faculty members assisted 48 senior and junior counsel to hone their advocacy skills at the most recent Senior Advanced Advocacy Course in the Four Courts in September. The course included a financial module at which accountants were brought through their evidence on a series of financial transactions and cross-examined by the participating advocates.

Back row (from left): Mark Connaughton SC; Anesta Weekes QC (England and Wales); Gerard Groarke BL; Andrew Beck BL; Donnchadh Woulfe BL; Darren Lehane BL; David Dabbs (England and Wales); Hein Snyman SC (South Africa); Michele O'Leary (England and Wales); Stephen Killalea QC (England and Wales); Philip Aldworth QC (Northern Ireland); Robert FitzPatrick BL; and, Alice Fawsitt SC. Middle row (from left): Mary Rose Gearty SC; Philip Stanley QC (England and Wales); Aoife Goodman SC; Sasha Gayer SC; Mrs Justice Geraldine Andrews (England and Wales); and, Thembi Ntoane (observer, South Africa). Front row (from left): Naome Manaka (South Africa); Patrick O'Reilly SC; Nuala Butler SC; and, Chris Arledge (USA).

Tackling your tax return

Donal Coyne, Director of Pensions, JLT Financial Planning Limited.

Barristers will have been busy clacking their calculators in the run up to the October 31 self-employed tax return deadline, but those using the Revenue Online Service (ROS) have some extra time as returns do not have to be in until November 12.

Tax relief against pension contributions paid before these deadlines is available for self-employed barristers. It is not possible to defer the contribution payment to a later date and qualify for the relief available. **Table 1** shows the maximum tax relief available from Revenue, which is determined by an age-related scale and subject to an overall earnings cap.

Table 1: Maximum tax relief available on a pension contribution.

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

**Subject to an earnings cap of €115,000.*

The Bar of Ireland Retirement Trust Scheme is operated by JLT Financial Planning and as we approach the tax deadline, the dedicated JLT Bar pension team will be coming to barrister workplaces to process pension contribution payments and give advice. Barristers will be able to attend meetings before both the October and November deadlines. These will be held on a first come, first served basis, and for details see **Tables 2** and **3**.

The Bar of Ireland Retirement Trust Scheme offers a range of investment funds, including: managed; absolute return; multi-asset; equity; bond; and, cash funds. The JLT team at the meetings will have detailed information on all the funds available. Existing members can use the online facility to access information.

If you plan on making a pension contribution, cheques must be made payable to 'The Bar of Ireland Retirement Trust Scheme' and a completed Contribution Top-Up Form must be included, which the JLT team will have available at the meetings.

According to JLT, this is the only opportunity barristers will get to substantially reduce their 2018 income tax liability. The company states that pensions are the most tax-efficient way to save for retirement. By contributing now, JLT states that you will not only benefit from a better retirement fund but also from the immediate tax relief (of up to 40% of the contribution paid for those on the higher rate).

If you are making a pension contribution, you no longer need to submit pension documentation with your tax return. Revenue may however request this at some point in the future. JLT states that it will issue the appropriate certification in respect of all contributions processed.

Over the next month or so, all self-employed barristers must file their tax return for 2018, pay any outstanding income tax from 2018, and pay preliminary income tax for 2019. If you contribute to The Bar of Ireland Retirement Trust Scheme, you can reduce your tax bill.

Table 2: October 31 – tax deadline meeting dates.

Date	Location	Room
Wed 30 • 12.30-2pm	CCJ, Parkgate Street	Staff Office (7th floor)
Wed 30 • 2pm-5pm	Church Street Building	Room C
Thur 31 • 10am-1pm	Distillery Building	Consultation Room 12 (3rd floor)
Thur 31 • 2pm-5pm	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)

Table 3: November 12 – tax deadline meeting dates.

Date	Location	Room
Fri 8 • 10.00-1pm	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)
Fri 8 • 2pm-5pm	Church Street Building	Room C
Mon 11 • 10am-1pm	Church Street Building	Room C
Mon 11 • 12.30-2pm	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)
Mon 11 • 2pm-5pm	Distillery Building	Consultation Room 12 (3rd floor)
Tues 12 • 10.00-1pm	Distillery Building	Consultation Room 12 (3rd floor
	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)
Tues 12 • 2pm-5pm	Church Street Building	Room C
	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)

Speaking for Ourselves

The National Women's Council of Ireland, Inclusion Ireland, Aware, Ruhama and Threshold were among the charities, NGOs and civic society groups that attended an advocacy training workshop for charities, Speaking for Ourselves, hosted by the Voluntary Assistance Scheme (VAS) of The Bar of Ireland on October 3.

Speaking for Ourselves was established to assist charities and NGOs to develop their advocacy skills and enhance their capacity to communicate as an organisation. The focus of this year's workshop was on effective advocacy skills and engagement with the Oireachtas, public bodies and the media.

Addressing the workshop were: Turlough O'Donnell SC; Mary Rose Gearty SC; Mr Justice George Birmingham, President of the Court of Appeal; Martin Macken, Q4PR; Senator Catherine Noone; and, Senator Ivana Bacik.

Providing guidance on law reform and the legislative process is just one aspect of the *pro-bono* assistance provided to groups from the voluntary sector by barristers under the VAS. It also provides assistance to charities on a wide range of legal areas including debt and housing, landlord and tenant issues, social welfare appeals, and employment and equality law. For more information on the VAS, see www.lawlibrary.ie.

Irish Rule of Law in Tanzania

Irish Rule of Law International (IRLI) delegates made a return visit to Tanzania in August. Among the Irish delegation helping to build institutional links between Ireland and Tanzania were: Mary Rose Gearty SC, Vice-Chair of IRLI; Ms Justice Aileen Donnelly, Court of Appeal; and, Kate Mulkerrins, Head of Legal Division of An Garda Síochána. The visit focused specifically on reducing violence against women and children, and promoting equality and the rule of law. Meetings were held with the Minister for Constitutional and Legal Affairs, the Minister for Health and the DPP.

The Tanzanian Minister for Constitutional and Legal Affairs, Dr Augustine Mahiga, with Ms Justice Aileen Donnelly during the recent visit of Irish Rule of Law International.

Letter to the Editor

Dear Editor,

May I, through your pages, convey my deep gratitude to colleagues who have expressed their condolences in recent days on the death of my son Gavin. Gavin bravely battled cancer for five years and beat it twice, only for it to return a third time. Gavin's life was in music, although he had a very brief career as a solicitor's court clerk!

I would particularly like to thank all who so kindly supported the 'Gig for Gav' in Vicar Street last April[1] and those who generously contributed to his GoFundMe page. Unfortunately, the treatment afforded by those contributions did not avail Gavin.

Sincerely,

Gavin Ralston SC

1. For those with a musical interest, there is a clip of him from the Gig for Gav on YouTube with Mike Scott and The Waterboys at www.youtube.com/watch?v=RKi_w5NrvDw.

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Balance at the Bar

To coincide with World Mental Health Day on October 10, the Council of The Bar of Ireland published the findings of a member survey it commissioned to examine a range of issues associated with workplace well-being.

Aedamair Gallagher
Senior Research & Policy Executive,
The Bar of Ireland

The report, entitled 'Balance at the Bar', details the findings of a survey that was independently conducted by Behaviour & Attitudes in May and June of this year.

Strong collegiality and collaboration

Many positives emerged from the survey. It is encouraging to learn that most members are ostensibly healthy and happy in life. Barristers are most likely to consider their career as stressful, but as one that is underpinned by enjoyment and fulfilment. A culture of collegiality and co-operation, which has long been regarded as one of the most valuable aspects of membership of the Law Library, continues to come to the fore, with four out of five members considering the Bar to be a collaborative place of work.

Struggling

However, it is clear that some members are experiencing difficulties. Some 23% said they felt they were "struggling", and 19% said they were "lacking in confidence", with both sentiments notably higher among female and younger respondents. Some 78% worry about being paid for work that they've completed, and 31% said that they have experienced depression or mental ill health because of work.

Bullying, discrimination and sexual harassment are perceived to be widespread at the Bar, with bullying the most widely experienced and witnessed, whereas discrimination and sexual harassment is almost exclusively experienced by female, and generally younger, barristers. The vast majority of barristers tend not to report incidents to any authority – primarily because it is perceived as commonplace or acceptable, and also because witnesses fear repercussions for reporting.

One in four barristers feel under relatively constant stress, with going into court cited as a major stressor, particularly among younger and female barristers. Two out of three barristers expressed concerns about their personal safety within the courts, and 56% of respondents expressed concerns about decision makers behaving in a hostile manner. Just over half of respondents (51%) made spontaneous references to judges behaving in a bullying, threatening or intimidating manner.

Global context

The report follows the publication of the largest ever global survey on bullying and sexual harassment in the legal profession, which was conducted and published by the International Bar Association (IBA) in May 2019. While some of the findings of the report on 'Balance at the Bar' make for distressing reading, the fact that the responses from members of the Law Library are, in many instances, so strikingly similar to those in the survey conducted by the IBA, demonstrates that these issues are not unique to the Irish Bar.

Action from The Bar of Ireland

This survey provides the Council with a very comprehensive benchmark of members' views and experiences, which will inform the work of Council and in particular of the Resilience and Performance Committee, over the coming year. Council is intent on addressing the very concerning findings of this survey and to ensure that supports provided are both as accessible and relevant as possible for those who are most in need – female and younger members of the Bar in particular.

Initiatives already introduced include amendments to the Code of Conduct, an improved parental leave policy, the Consult-a-Colleague helpline, wellness education and training, and a dedicated mentoring scheme. It is clear from the survey that there is a direct correlation between the mental health of barristers and whether they feel they are making a good living or struggling financially. In order to address this, the Council is introducing an enhanced fee information and fee recovery service for members this year, which should go some way towards supporting members on this front.

The Council will continue to take action that will both contribute to the cultivation of a more supportive working environment for its members, and drive a cultural change that ensures that there is no place in the profession for toxic behaviour that impacts on members' mental well-being. Any behaviour that causes a colleague distress, whether overt or unintended, is unacceptable.

The Council will work with members to break any perception that there is a cultural acceptance of improper behaviour. Any member affected by any of the issues raised is reminded of the Consult-a-Colleague helpline, which can be contacted on 01-817 4790 or 01-817 4791.

A copy of the 'Balance at the Bar' member report can be found on www.lawlibrary.ie.

Recent LSRA developments

The Minister for Justice, Charlie Flanagan TD, commenced several important parts of the Legal Services Regulation Act, 2015 on the first day of this legal year, October 7. The newly commenced provisions deserve careful reading by members.

Dara Hayes BL, Chairman, LSRA Committee

Discipline

The disciplinary function of the Legal Services Regulatory Authority (LSRA), under Part 6 of the Act, has now been commenced, although the Barristers' Professional Conduct Tribunal (BPCT) will remain in being for some time yet. Complaints can now be made by or on behalf of clients about inadequate service or excessive fees, and complaints about misconduct by a barrister can be made by any person. Misconduct is defined in the Act and includes a breach of the Code of Practice for Practising Barristers.

Complaints

When a complaint is made, a determination will be made as to its admissibility. A complaint that is frivolous, vexatious or without substance or foundation will not be admissible. Nor will a complaint be admissible if its substance has been previously determined. If the complaint relates to inadequate service or excessive fees, it can be dealt with by way of informal resolution where the LSRA provides a mediator. Otherwise, a formal determination will be made by the Authority. This could involve ordering the practitioner to rectify the inadequate service, to undertake training or other steps, to pay compensation, or to waive or refund costs. Any party dissatisfied with a ruling of the LSRA can appeal to the Review Committee.

Misconduct

Where the complaint alleges misconduct, it will be referred for investigation to the Complaints Committee if deemed admissible. If the practitioner accepts the allegation, the Complaints Committee can impose one or more of a series of sanctions. Where the allegation is not accepted, the Committee will, once it completes its investigations, send the matter to the Disciplinary Tribunal for hearing. Hearings will generally be held in public. A practitioner sent for hearing may be required to furnish the Tribunal with an outline of their intended evidence. Upon conviction, the Tribunal can impose sanctions ranging from advice and admonishment to compensation and temporary or permanent restrictions on practice. An appeal can be made to the High Court. Members are entitled to be legally represented at each stage of the disciplinary process. Both committees and the tribunal will have lay majorities. When the complaint is against a barrister, a barrister will sit on the relevant body. Four members of the Law Library have been nominated to the Review Committee and a further four to the Complaints Committee. Six members have been nominated to the Disciplinary Tribunal.

Barristers' Professional Conduct Tribunal

The BPCT will continue to exist and will deal with complaints received prior to the commencement of the relevant part of the Act. However, the way in which the Act was drafted requires the BPCT to determine complaints made after the commencement where the alleged misconduct occurred before that date. This means that the BPCT must be kept in being with its attendant costs. The Council is working to bring about a situation where the BPCT can be wound up at the earliest opportunity so members only have to fund one disciplinary system.

Costs

Parts 10 and 11 of the Act, which deal with legal costs, have now been commenced. Briefly, they provide that costs must not be a specified portion of damages. Nor may a junior counsel calculate his or her fee by reference to the fee marked by senior counsel. A barrister shall provide, when requested, a notice setting out either the fees that will be incurred or the basis upon which the fees will be calculated. When furnishing a fee note to a client, the legal practitioner must give specified information to the client about how to dispute a fee and how to resolve such a dispute. Part 11 gives statutory effect to the principle that costs follow the event, but sets out matters that may be taken into account by a court in departing from that rule.

Clients in custody

Section 215 of the Act has now been commenced. This requires a barrister whose client is in custody to seek permission of the court before ceasing to act for that client. To withdraw from a case without such permission may constitute misconduct. While this provision may have greater relevance to criminal practitioners, it will also apply to civil practitioners where, for example, they are acting for a prisoner in a personal injuries action or a judicial review. Colleagues will need to be cognisant of the extra step required by this provision when handing over a case to a colleague.

Conclusion

By necessity, this can only be the briefest of guides to the new provisions and I repeat the recommendation for all colleagues to read the newly commenced provisions for themselves.

Noel Whelan

Had the 1997 General Election turned out differently, Noel Whelan might never have practised as a lawyer. He didn't win a seat in Dublin South East in that election, and so his thoughts turned to the law. He eschewed the usual route for politicians who would be barristers, of devilling with a known political sympathiser in the Law Library, and sought instead to devil with a mere lawyer who had no political affiliations. It was an immediate indication that he intended to be as good a lawyer as he could be, and that the practice of law was not just a stopgap for fallow periods in a political career. That's how I came to know him and had the pleasure and privilege of having him as my devil in the year 1998-1999. It helped too that we both hailed from south west Wexford. During that year, as we travelled up and down the South Eastern Circuit, we had many great conversations about the respective roles of politics and law in society.

An open mind

Noel understood the importance of an open mind; the need to assume nothing; the need to question everything, and that made him a fine lawyer. He realised that in most cases "chronology tells the tale" – that if you know the order of events then you will get insight into what happened and why it happened. I think that the practice and discipline of law informed his other contributions as a commentator on political matters.

Noel also knew and subscribed to the view that the practice of law is at its finest when it gives a voice to the voiceless, when it speaks truth to power. The struggle for fairness in human affairs is the worthiest of human endeavours. Over the years, Noel and I were involved in many such cases ranging from personal injury cases to medical negligence cases, to a challenge to diplomatic immunity, to the rights of a franchisee against a powerful franchisor. In each case, we acted on the side of the less powerful, if not exactly the powerless, party. In all of those cases we acted on the basis of 'no foal, no fee'. In most of the cases we were briefed by solicitor Simon Kennedy, a man who also went to his reward this summer. When discussing his passing in June of this year, Noel and I agreed that despite the financial and consequential professional difficulties that beset Simon in the latter part of his career, he had been a warrior in the law, always willing to take up the cudgels on behalf of the 'little man'.

Of all the cases in which we were involved, I think the one that gave Noel the greatest satisfaction was the case of *Redmond v Minister for the Environment, Ireland and the Attorney General*. In fact, we reminisced about it shortly before his death. In 2000, Noel had published a book entitled *Politics, Elections and the Law*. At that time, he was junior counsel to Paddy McCarthy SC and me in the *Redmond* case, which was a constitutional challenge to the requirement to pay a deposit to stand for election to Dáil Éireann and the European Parliament. Noel understandably was in his element. Shortly before the hearing before Herbert J., he sourced a Canadian decision, *Figueroa v Canada*, in which Molloy J. had analysed a similar deposit requirement in Canadian law and found it repugnant to the Canadian Charter of Rights. Citing that decision, Herbert J. found that the deposit system required by the Electoral Act 1992 and the European Parliament Act, 1997, discriminated against those persons who did not have money. He further held that the deposit requirement had the effect, even if unsought, of excluding from the ballot paper a considerable percentage of the adult citizens of the State and was thus repugnant to Article 40.1 of the Constitution. The finding of Herbert J., thereafter known to us as "Democracy Dan", was appropriately celebrated. A number of years later, the plaintiff in the case was convicted in the Special Criminal Court of membership of an unlawful organisation. On being told this, Noel wryly observed: "That's what happens when you don't have proper democratic processes".

In early 2007, Noel became prosecutor for Co. Wexford, a role I had held when he devilled for me in 1998/99. He subsequently became prosecutor in Waterford in late 2008, a position he held until his admission to the Inner Bar in 2018. Such is the volume of criminal business in cities the size of Waterford, that the role of prosecutor has now become virtually a full-time one. Prosecuting is an onerous job and in recent years, with the explosion in the reporting of sexual crimes, an emotionally draining one. By all accounts, Noel performed that role with the diligence and tenacity with which he approached everything.

In the course of his 20-year career as a junior, Noel gave back to the profession by acting as master to 13 'devils'. I asked Caroline Latham BL what he had been like as a master and I wasn't surprised by her reply. She said:

"Noel was an exceptional master. He was so generous with his time always, and this continued long long after we left the comfort of the devil/master relationship – 'devils are for life' was his motto! He was genuinely interested in our views and as Frank Hutchinson (State Solicitor) has oft quoted since his passing: 'Noel used those rare and magic words with his devils – 'what do you think?''. He provoked our intellects and challenged each of us to be the best that we could possibly be. There was no such thing as a stupid question. He gently guided us through the early years, never criticising. Noel was an inspiration to us all. He had a tremendous gift for human relationships, and once he pulled you in, there was no leaving the fold – we were family. I can only aspire to be half the barrister and human he was. I miss my friend and mentor".

It is particularly poignant and cruel that Noel should die just as he was embarking on his new career as a senior counsel. He had so much more to give.

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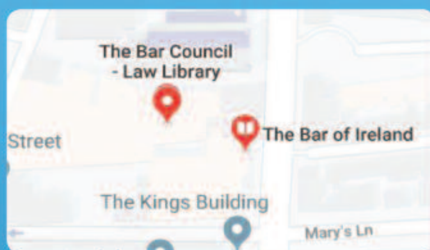

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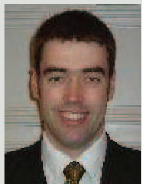
Recent case law on sentencing for involuntary manslaughter has highlighted the importance of the definition of 'dangerousness'.



Donal O'Sullivan BL

Introduction

Manslaughter is one of those rare offences still in existence in this jurisdiction that is entirely a common law offence. It is divided into two categories, voluntary manslaughter and involuntary manslaughter, which themselves can be further subdivided. Voluntary manslaughter relates to circumstances whereby a murder charge is mitigated by, for example, provocation, excessive self-defence or diminished responsibility. Involuntary manslaughter concerns two sub-categories: manslaughter caused by an unlawful and dangerous act; and, manslaughter by gross negligence.[1]

The purpose of this article is to consider the constituent elements of the offence of involuntary manslaughter by an unlawful and dangerous act, most especially the concept of 'dangerousness', this having become somewhat topical due to recent case law on the issue of sentencing for such an offence.

Frequently, this type of offence is referred to as 'one-punch manslaughter', or 'assault manslaughter'. It arises regularly from situations where a relatively minor assault occurs, as in a single punch, arising from which death follows in an unforeseen manner, often due to the nature of the fall suffered by the victim following the punch, or from a pre-existing weakness in the victim, rather than due to the nature of the unlawful and dangerous act itself.

This has posed considerable issues for the law, as there is consequently no real correlation between the charge an accused in this situation faces, manslaughter, and the nature and quality of the act the accused has actually carried out. Frequently, a person who throws a single punch with no great force attached to it would generally face, at worst, a charge of assault contrary to s.2 of the Non-Fatal Offences against the Person Act, 1997.

This problem has been recognised by the Law Reform Commission in its report on homicide published in January 2008, in which it acknowledged "that the most problematic aspect of unlawful and dangerous act manslaughter is that it punishes very harshly people who deliberately perpetrate minor assaults and thereby unforeseeably cause death, due perhaps to an unexpected physical weakness in the victim".[2] It went on to recommend that in such circumstances, a separate offence of "assault causing death" should be introduced. This has not yet occurred.

There has been little case law on this matter from the superior courts in this jurisdiction, perhaps due to a more lenient sentencing approach from the Circuit Criminal Court, whereby pleas of guilty would be entered to this charge in the hope and anticipation that a fully suspended sentence, or a very short sentence measured in months rather than years, would follow.

This year, the Supreme Court has delivered judgment in *People (DPP) v Mahon*,[3] where the judgment sets forth a classification of manslaughter sentences. These range from lower culpability, with a sentence range from 0-4 years, to medium culpability (which in this judgment includes one-punch type scenarios, see paragraph 65 and particularly paragraph 67 of the judgment), which attract a sentence range of 4-10 years. High culpability offences range from 10-15 years, and the worst cases range from 15-20 years with a possibility of a life sentence. These are all headline, pre-mitigation sentences; however, one can see that it will be a rare case indeed when a one-punch type situation resulting in death will result in a sentence that is less than several years' imprisonment.

The law as it stands

The law in Ireland relating to involuntary manslaughter can be found summarised helpfully in the judgment of the Court of Criminal Appeal in the case of *People DPP v. Horgan*[4] from 2007. The Court there stated as follows:

[17] In Ireland, a conviction for unlawful and dangerous act manslaughter (where the unlawful act is an assault) arises where:–

(a) the act which causes death constitutes a criminal offence and poses the risk of bodily harm to another;

(b) the act is one which an ordinary reasonable person would consider to be dangerous, that is, likely to cause bodily harm; and,

(c) in this regard 'dangerousness' is to be judged objectively.

In such situations, a conviction for manslaughter would arise where the act that caused damage constituted a criminal offence and posed a risk of bodily harm to another. The act is one which an ordinary, reasonable person would consider to be dangerous, dangerous being defined as something that is likely to cause bodily harm, and dangerousness is to be judged objectively.

The issue arising in the case law, and which is the principal concern most people have when dealing with this offence, is what exactly is required for the act to be dangerous? There is rarely going to be an argument as to whether something is unlawful; in essence, it is either an assault or not. However, what exactly was intended and foreseen by the person who threw the punch, and by the objective person standing beside him or her at the time? The *Horgan* case indicates that the offence requires that the unlawful act be one which is likely to cause bodily harm. Consequently, the simple question follows: what is bodily harm? Ultimately, this is the nub of this matter.

An innocent party who had attempted to break the fight up was unfortunately stabbed by one of the co-accused, who had gone to a particular location armed with a knife.

Cases of this nature in Ireland frequently refer back to a case of *People v. Crosbie and Meehan*,[5] which was a judgment of the Court of Criminal Appeal delivered by Kenny J. This case involved convictions for manslaughter arising out of a large melée in which an innocent party who had attempted to break the fight up was unfortunately stabbed by one of the co-accused, who had gone to a particular location armed with a knife, albeit he had not intended to use same, but he was going to that location intending to give another party a beating.

On page 495 of the report, the Court of Criminal Appeal referred to an English Court of Appeal decision in *R v. Larkin*. In this case, the Court held that if the act of a person is unlawful, and it is also a dangerous act "which is likely to injure another person", and quite inadvertently caused the death of that other person, then he is guilty of manslaughter. That statement of the law was approved by Kenny J. in *Crosbie and Meehan*, and appears to have been followed consistently in this jurisdiction since.

There is a certain view (and in this regard, reference is particularly made to a quotation from the Law Reform Commission Consultation Paper on Involuntary Manslaughter, which is cited in paragraph 18 of the *Horgan* judgment), that an intention to inflict a somewhat "trivial injury" makes it justifiable at law to hold a person accountable for the death by recording a conviction for manslaughter.

However, the words "trivial injury" occur nowhere in any of the cases. Neither the *Larkin* nor the *Crosbie and Meehan* case refer to this phrase at all. What is stated in those cases is that for something to be a dangerous act, it is something which is "likely to injure another person". There is nothing relating to a "trivial injury".

This issue received some attention in this jurisdiction in the case of *People (DPP) v. Hendley*[6] from 1993. It was held, quoting directly from *Crosbie and Meehan*, that the correct view in terms of manslaughter is that the act causing death must be unlawful and dangerous, the dangerous quality of the act is to be judged by objective standards, and it is irrelevant that the accused did not think that the act was dangerous. In Australia, there has been some consideration of this issue in terms of what is required to be "dangerous". In a case of *R v. Holzer* from 1968, Smith J. in the Supreme Court in Victoria held:

"Authorities differ for the degree of danger which must be apparent in the act, the better view, is I think that the circumstances must be such that a reasonable man in the accused's position, performing the very act which the accused performed, would have realised that he was exposing the others to an appreciable risk of really serious injury".

In the seminal work of Charleton on *Criminal Law*, Smith J.'s directions to the jury, which followed the above citation, are described as "being a model exposition to a jury as to how assault manslaughter occurs".[7]

That view of Smith J. was echoed and applied by the High Court of Australia in a case of *Wilson v. R*[8] from 1992. The Court considered the *Holzer* decision and amended it slightly (page 270 of the report):

"It is better to speak of an unlawful and dangerous act carrying with it an appreciable risk of a serious injury. A direction in those terms gives adequate recognition to the seriousness of manslaughter and to respect for human life whilst reserving a clear distinction for murder".

It is not clear whether or not the law in Australia, and in particular the *Holzer* standard, which requires "an appreciable risk of serious injury" applies in Ireland. Notwithstanding the views expressed by Charleton in *Criminal Law* (cited above), this was not the standard the Court of Criminal Appeal referred to in the *Horgan* case, in which the standard applied was a likelihood of causing bodily harm.

What is the current law in Ireland?

The current law in Ireland appears to be that there must be a risk of bodily harm to another (the *Horgan* standard) or, as described in *Crosbie and Meehan*, a "likelihood of injury". There would appear to be little difference of substance between these two standards, rather a difference in phraseology.

It does not appear to be the case that the risk of a trifling/minor injury or harm being caused will suffice, but rather that for a conviction to safely be recorded, a jury must be satisfied that the evidence shows that an unlawful and dangerous act took place, and that when determining whether the act was dangerous, the jury must be satisfied

on the evidence that an objective person would have taken the view that the act carried out by the accused was one that was likely to cause bodily harm.

What therefore is "bodily harm"? It is respectfully submitted that even if the Australian law does not apply explicitly, it appears from the line of cases from *Crosbie and Meehan*, through *Hendley* to *Horgan*, that a jury would be instructed to exercise common sense when determining this issue. Bodily harm is a phrase that any jury member should be able to understand and to give a common sense meaning to.

Consequently, the facts of any given case are paramount. It is certainly open to a defence lawyer to argue that a single punch, with no great force behind it, is not something that a reasonable person would have thought carried with it a likelihood of causing bodily harm/injury. The argument can, of course, gain greater strength if there are witnesses to the event who can give evidence as eyewitnesses as to whether the blow struck was one that caused them concern. Indeed, there will be CCTV footage available of such an event (these matters occurring frequently in or outside licensed premises to which almost invariably CCTV cameras are affixed), which will allow the jury to assess the matter for themselves.

Of course, if the punch was one with great force, or if there were multiple punches, or if a person is kicked in the head area, especially if already on the ground, then a jury would be absolutely entitled to take the view that there was a risk of bodily harm. Such a conclusion would be in accordance with common sense.

It is to be hoped that the Oireachtas will legislate on this matter in the near future, bearing in mind the recommendations of the Law Reform Commission Report from 2008.

Halting a criminal trial – Addendum

Donal O'Sullivan BL

In the November 2018 edition of *The Bar Review*, I wrote a piece on the principles applicable to applications being made to stop a criminal trial during the trial itself, so-called "PO'C" applications. One of the issues considered was the burden of proof with regard to said applications, where this writer noted that the issue was one that might be clarified by the Court of Appeal in a suitable case. That clarification has since arrived in the case of *DPP v Carthy*,[9] where one of the grounds of appeal related to a PO'C-type application to stop the trial. Delivering the judgment of the Court of Appeal, Kennedy J. stated as follows at paragraph 40:

"An application to stop the trial, if made, is invariably made at the conclusion of the prosecution's case on the basis of the evidence as it stands at that point. The trial court has an inherent jurisdiction to stop the trial if there is a real risk of an unfair trial which cannot be avoided by appropriate directions. The standard in such an application is the civil standard and the burden is borne by the defendant. The instant case, the trial judge having refused the application was correct in refusing the adjournment sought. This ground therefore fails".

It now appears clear that in any PO'C application, the burden of proof will lie upon the accused to the civil standard of proof.

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1. See *People (DPP) v Horgan* [2007] 3 I.R. 568 at 574.
2. Law Reform Commission Report on Homicide, January 2008, at paragraph 5.39.
3. [2019] I.E.S.C. 24, paragraph 49 onwards.
4. [2007] 3 IR 568 and in particular on page 574 thereof at paragraph 17.
5. [1966] IR 490.
6. Unreported, Court of Criminal Appeal, O'Flaherty J., June 11, 1993, in particular the second last page of the judgment.
7. Charleton *et al*., *Criminal Law*. Dublin, 1999, para. 7.119.
8. 107 ALR 257.
9. [2019] I.E.C.A. 94.

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Aircraft Noise (Dublin Airport) Regulation Act 2019 (commencement) (no. 2) order 2019 – SI 403/2019
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Cervical Check Tribunal Act 2019 – Act 31/2019 – Signed on: July 23, 2019

Bills initiated in Dáil Éireann during the period June 21, 2019, to September 27, 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.

Broadcasting (amendment) bill 2019 – Bill 64/2019
Cervical Check Tribunal bill 2019 – Bill 44/2019
Child care (amendment) bill 2019 – Bill 66/2019
Criminal justice international co-operation bill 2019 – Bill 49/2019
Criminal records (exchange of information) bill 2019 – Bill 62/2019
Curragh of Kildare (amendment) bill 2019 – Bill 56/2019 [pmb] – Deputy Fiona O'Loughlin
Defence forces (evidence) bill 2019 – Bill 65/2019
Finance (tax appeals and prospectus regulation) bill 2019 – Bill 45/2019
Firearms and offensive weapons (amendment) bill 2019 – Bill 50/2019 [pmb] – Jim O'Callaghan
Health (amendment) (no. 2) bill 2019 – Bill 53/2019 [pmb] – Deputy Anne Rabbitte
Housing (regulation of approved housing bodies) bill 2019 – Bill 61/2019
Intoxicating liquor (amendment) bill 2019 – Bill 70/2019 [pmb] – Deputy Kevin O'Keeffe
Investment limited partnerships (amendment) bill 2019 – Bill 42/2019
Merchant shipping (investigation of marine casualties) (amendment) bill 2019 – Bill 54/2019 [pmb] – Deputy Mattie McGrath
Planning and development (ministerial oower repeal) bill 2019 – Bill 69/2019 [pmb] – Deputy Eoin Ó Broin
Prohibition of nuclear weapons bill 2019 – Bill 60/2019
Road traffic (amendment) (use of electronic scooters) bill 2019 – Bill 72/2019 [pmb] – Deputy Marc MacSharry
Social housing (real social housing) bill 2019 – Bill 48/2019 [pmb] – Deputy Eoin Ó Broin
Thirty-ninth amendment of the Constitution (presidential elections) bill 2019 – Bill 68/2019

Bills initiated in Seanad Éireann during the period June 21, 2019, to September 27, 2019

Assisted decision-making (capacity) (amendment) bill 2019 – Bill 55/2019 [pmb] – Senator Rose Conway-Walsh, Senator Paul Gavan and Senator Máire Devine
Blasphemy (abolition of offences and related natters) bill 2019 – Bill 59/2019
Citizens' assemblies bill 2019 – Bill 52/2019
Criminal justice (judicial discretion) (amendment) bill 2019 – Bill 46/2019 [pmb] – Senator Marie-Louise O'Donnell
Criminal justice (mutual recognition of decisions on supervision measures) bill 2019 – Bill 63/2019
Redress for women resident in certain institutions (amendment) bill 2019 – Bill 43/2019
Road traffic (amendment) bill 2019 – Bill 71/2019 [pmb] – Senator Frank Feighan, Senator Martin Conway and Senator Catherine Noone
Social welfare bill 2019 – Bill 51/2019
Taisceadán (valuable property register) bill 2019 – Bill 57/2019 [pmb] – Senator Martin Kenny and Senator Donnchadh Ó Laoghaire
Valuation (amendment) bill 2019 – Bill 57/2019 [pmb] – Senator Anne Rabbitte

Progress of Bills and Bills amended in Dáil Éireann during the period June 21, 2019, to September 27, 2019

Aircraft noise (Dublin Airport) regulation bill 2018 – Bill 130/2018 – Committee Stage
Citizens' assemblies bill 2019 – Bill 52/2019 – Committee Stage
Coroners (amendment) bill 2018 – Bill 94/2019 – Passed by both Houses of the Oireachtas
CervicalCheck Tribunal bill 2019 – Bill 44/2019 – Committee Stage – Passed by Dáil Éireann
Data sharing and governance bill 2018 – Bill 55/2018 – Passed by Dáil Éireann
Disability (miscellaneous provisions) bill 2016 – Bill 119/2016 – Committee Stage
Qualifications and quality assurance (education and training) (amendment) bill 2018 – Bill 95/2018 – Passed by Dáil Éireann
Regulated professions (health and social care) (amendment) bill 2019 – Bill 13/2019 – Committee Stage

Progress of Bills and Bills amended in Seanad Éireann during the period June 21, 2019, to September 27, 2019

Blasphemy (abolition of offences and related matters) bill 2019 – Bill 59/2019 – Committee Stage
Citizens' assemblies bill 2019 – Bill 52/2019 – Committee Stage
Health Service Executive (governance) bill 2018 – Bill 90/2018 – Committee Stage
National minimum wage (protection of employee tips) bill 2017 – Bill 40/2017 – Committee Stage
Parental leave (amendment) bill 2017 – Bill 46/2017 – Committee Stage
Qualifications and quality assurance (education and taining) (amendment) bill 2018 – Bill 95/2018 – Committee Stage
Social welfare bill 2019 – Bill 51/2019 – Committee Stage
Wildlife (amendment) bill 2019 – Bill 77/2016 – Report Stage

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

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

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

Border rights and Brexit

The prospect of a no-deal Brexit has significant and worrying implications for both cross-border criminal justice and human rights.

Derek Kenneally SC

Since the Belfast/Good Friday Agreement (GFA) in 1998, and despite differences in law, economics and cultural identity, the peoples of Northern Ireland and the Republic of Ireland have developed a close daily interaction, built on a parity of esteem that once could hardly be imagined, a way of life underpinned by what Prof. Fiona de Londras describes as: "…the institutions and human rights commitments that lie at the heart of the (GFA)".[1]

Criminal justice

Quite apart from the GFA, there are other fundamentally important systems and arrangements, some, but not all, of which arise from our common membership of the European Union (EU) and which have played their part in the trans-jurisdictional relationship with Northern Ireland, particularly the Common Travel Area (CTA) and co-operative justice arrangements (CJAs), including the European Arrest Warrant (EAW) system.

Those three pillars, so fundamentally important to life on this shared island, now face challenges brought about by UK withdrawal from the EU, particularly if that occurs without a withdrawal agreement. In the absence of a comprehensive agreement that addresses these critical areas, the legal uncertainty arising will lead to disruptions and delays in all forms of cross-border co-operation in the area of criminal justice, including the investigation and prosecution of cross-border crime. Lawyers advising will have to have careful regard to several important matters:

1. After UK withdrawal, EAWs issued by Ireland will not be recognised in the UK, including Northern Ireland, unless the requested person has already been arrested. The EU has yet to issue any guidance on what will happen to outstanding UK EAWs at that time. Similarly, European Investigation Orders (EIOs) and other forms of co-operation that involve giving effect to an order made in another member state, for example decisions to collect evidence or to freeze bank accounts, will not be recognised in the UK, if received after exit day.
2. The UK will no longer be required to give effect to orders made in connection with criminal proceedings in another member state, or vice versa, such as European Protection Orders, 'Euro-bail' or financial penalties imposed on those found guilty of a crime. The UK will no longer be a party to reciprocal arrangements to facilitate access to compensation in one member state by victims of crime in another member state.
3. In the absence of agreement, the UK, including Northern Ireland, will cease to be a member of any of the specialist EU agencies, and will no longer be eligible to access data held or participate in data exchange agreements operated or facilitated by them. There are contingency arrangements proposed by the UK, but at the time of writing, a little over a month before the stated date of withdrawal, there are no agreements to give effect to those proposals.
4. The UK will no longer be able to initiate or participate in joint investigation teams set up in support of cross-border police investigations under EU instruments after withdrawal, in the absence of an agreement to the contrary. This will have a significant and immediate impact on this island in respect to cross-border investigations into the activities of organised criminal gangs involved in drug trafficking, smuggling of fuel, cigarettes and other contraband, organised thefts of ATMs and their contents, kidnapping and intimidation, and even human trafficking.
5. Withdrawal without agreement will have an impact on prisoner repatriation and deportation programmes.

Human rights implications

It is unnecessary to emphasise that the enjoyment of the current trans-jurisdictional lifestyle, including the extensive access to ongoing education, employment and trade, involves the exercising of human rights protected under the European Convention on Human Rights (ECHR).[2] What may require emphasis is that those trans-jurisdictional engagements are aided by, but are not a creature of, any EU treaty or the GFA. Rather they exist by virtue of a unique non-treaty-based arrangement between the UK and Ireland – the CTA.

The openness of travel between the UK and Ireland dates to 1922, with neither country requiring passports from the other.[3] The UK's 1949 Ireland Act, section 2, formalised the special relationship between the UK and Ireland by declaring that Ireland, while no longer a dominion of the UK, is not a 'foreign country'. In 1952 the CTA came into force, and exists as a collection of legal provisions in each jurisdiction rather than as an international treaty. These provisions enable UK and Irish citizens to be treated almost identically within both states.

The CTA permits freedom of travel and benefits including unfettered access to social welfare entitlement, healthcare, employment and education between the UK, Ireland, the Channel Islands and the Isle of Man. UK citizens in Ireland and Irish citizens in the UK have the right to vote in local, national and European elections. Oddly, although Irish citizens can run for the UK Parliament, UK citizens cannot be elected to the Dáil, nor can they vote in constitutional referenda or Presidential elections. Irish citizens resident in the UK can vote in UK referenda.

The openness of travel between the UK and Ireland dates to 1922, with neither country requiring passports from the other.

In a discussion paper on Brexit written by the UK-based academics Colin Murray, Aoife O'Donoghue and Ben Warwick for the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission,[4] the authors point out that: "Historically the CTA was not seen in a human rights context. But as gaps between EU freedom of movement and CTA rights open, the CTA will become a more critical source of protection for, in particular, economic, social and cultural rights".[5]

At present the EU treaties allow for the operation of the CTA under the provisions of the Treaty on the Functioning of the European Union (TFEU).[6] In practical terms, the functioning of the CTA was unproblematic, both before and after the UK and Ireland became members of the EU. However, post withdrawal, the CTA will cover the relationship between a nation within the EU and another that is fully external to it. As Murray, O'Donoghue and Warwick point out, the history of the EU does not provide any significant precedent governing that situation. The closest comparator is Norway's inclusion in the Nordic common labour market, but Norway's membership of the European Economic Area (EEA) means that they cannot be considered a full 'third country' as the UK must be if they leave the EU without an agreement to the contrary.

This is no trifling or peripheral matter. The Phase 1 Joint Report[7] of the EU and UK negotiators indicates that the EU and UK agree (but do not guarantee) that the CTA may continue with the stipulation that its continuation respects the rights of natural persons as conferred by EU law and the UK confirms that the continuation of the CTA will not impact on Ireland's obligations under EU law, including the free movement of persons.[8] However, the CTA, as already stated, is not treaty based. It is relatively flexible and informal, and therefore vulnerable to modifications that may go unnoticed but have significant and far-reaching effects on our daily interaction not only with England, Wales and Scotland but, importantly, with Northern Ireland also.

Murray, O'Donoghue and Warwick recommend, *inter alia*, the negotiation of a common travel area treaty between the UK and Ireland to prevent incremental changes to the CTA's operation and to give UK and Irish citizens assurances as to their status and continued access to social, education, democratic, health and welfare rights.[9] That is a recommendation with merit, subject to the real concern that the negotiations may, in the manner of such engagements, lead to some diminution, if such is considered expedient to 'seal the deal'.

A further point of concern is that the special relationship that underpins the existence of the CTA may come under pressure from nationalistic influences, which have been visible within England in particular, giving rise perhaps to a less sympathetic attitude towards the special treatment of Irish citizens and a movement away from the principle of not regarding Ireland as a foreign country. The question is also begged as to what possible dynamic might emerge if there are voices within the EU that are unhappy with what becomes perceived as 'special treatment' of Irish citizens, if the treatment of other EU citizens residing in the UK becomes more restrictive than it currently is.

The European Arrest Warrant

The threats to co-operative justice arrangements affected by a 'no deal' withdrawal by the UK are severe, and: "Brexit will lead inevitably to a diminution in the level and nature of co-operation between the UK and remaining EU states, for structural, legal, political and practical reasons".[10] Of particular importance to the work of criminal/human rights lawyers in this jurisdiction is the operation of the EAW system. The UK is one of the most active users of the EAW system. In Northern Ireland, between 2007 and 2017, of the 154 EAWs sought by the Police Service of Northern Ireland (PSNI), 113 involved a request to the Republic of Ireland.[11]

The operation of the EAW system is overseen by domestic courts and, since 2009, the Court of Justice of the European Union (CJEU) has enjoyed the jurisdiction to hear references from domestic courts regarding the operation of the EAW.[12] The CJEU's interpretation of EU law, within a preliminary ruling issued to such a reference, is binding upon the domestic courts of the member states. In the course of such rulings, the CJEU applies the provisions of the EU Charter of Fundamental Rights (CFR).[13] It will not require explanation that the EU CFR articles in respect of the right to liberty,[14] the right to humane treatment,[15] the right to a private and family life,[16] and the right to a fair hearing[17] have particular importance when advising clients in the matter of an EAW.[18] The UK Government has expressed previously a desire to maintain the EAW, but it is not possible to reconcile that aspiration with its refusal to countenance any oversight by the CJEU or the intended non-retention of the CFR post withdrawal.

In the case of no deal, the alternative basis for extradition between the UK and Ireland will be the 1957 European Convention on Extradition. Unlike the EAW system, the Convention does not impose time limits on the execution of requests, does not prevent extradition being refused for lack of dual criminality or political, military or fiscal offences, and permits parties to refuse to extradite their own

nationals. Extradition requests between the UK and Ireland would have to be transmitted through diplomatic channels rather than decisions being made exclusively by judicial authorities and transmitted directly between the relevant national authorities.

In *Minister for Justice and Equality v O'Connor*,[19] the Supreme Court, on March 12, 2018, made a preliminary reference to the CJEU under Article 267 of the TFEU on the issue of the impact, if any, on the operation of the EAW system arising from the fact of the Article 50 notice delivered by the UK. Shortly thereafter (May 2018), the High Court in *Minister for Justice and Equality v R.O.*[20] also made a request for a preliminary ruling under Article 267 TFEU, on the same form of issue, together with a request that the reference be dealt with under the urgent procedure having regard to the fact that, unlike Mr O'Connor in the Supreme Court reference, Mr R.O. was in custody. On September 19, 2018, having granted the request that the Court deal with the reference under the urgent procedure, the CJEU ruled:[21]

"Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European U in accordance with that article does not have the consequence that, in the event that that Member State issues a European Arrest Warrant with respect to an individual, the executing Member State must refuse to execute that European Arrest Warrant or postpone its execution pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the European Union. In the absence of substantial grounds to believe that the person who is the subject of that European Arrest Warrant is at risk of being deprived of rights recognised by the Charter of Fundamental Rights of the European Union and Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European Arrest Warrant while the issuing Member State remains a member of the European Union".

Accordingly, until such time as the UK withdraws from the EU, it has full rights, powers and obligations under the EAW system. There is, however, a clear and urgent requirement for a replacement system if, as seems inevitable, the UK rejects CJEU oversight and cannot remain within the EAW system. That replacement system must provide for adequate judicial oversight mechanisms, which take account of developing EAW jurisprudence, maintain comparable standards of rights protections, and exclude discretion over the transfer of a country's citizens.

The Good Friday Agreement

Turning to the issue of the potential direct impact of withdrawal on the GFA, the Preamble of the British-Irish Agreement states the wish of both governments to:

"…develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union…".[22]

The GFA further provides that the Northern Ireland Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas:

"subject to…the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void".[23]

Strand Three of the GFA contains specific provision in respect of rights, safeguards and equality of opportunity. These require, *inter alia*, that the British Government will complete incorporation into Northern Ireland law of the ECHR, with direct access to the courts and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on the grounds of inconsistency,[24] and that the Northern Ireland Human Rights Commission would be invited to consult and advise on the scope for defining in Westminster legislation, rights:

"…supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem and – taken together with the ECHR – to constitute A Bill of Rights for Northern Ireland…".[25]

The GFA further requires comparable steps by the Irish Government equally drawing upon the ECHR and other international legal instruments in the field of human rights. This requirement specifies that:

"…the question of the incorporation of the ECHR will be further examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland".[26]

The GFA not only includes a commitment to the protection of rights on an equivalent basis across the two jurisdictions, but it is constructed on the belief and understanding of all parties to it that both the UK and Ireland would be members of the EU and parties to the ECHR. A concern therefore arises on foot of the clearly held view that it is the intention of the UK Government to withdraw from the ECHR. It is also understood that the CFR will be omitted from any retained EU law. In March 2018, the Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, a body envisaged under the terms of paragraph 10 of the GFA,[27] published a policy statement on the UK withdrawal from the EU.[28] The introduction to the statement includes the following passage:

"Progress towards a lasting resolution of the conflict in Northern Ireland and Ireland has been grounded in the human rights and equality provisions of the 1998 Agreement. The equality and human rights framework which underpinned the 1998 Agreement assumed the UK's and Ireland's continuing common membership of the European Union. The significance of that common membership is seen in explicit acknowledgement of their relationship 'as partners in the European Union'[29] and frequent reference to the EU throughout the document. The UK's withdrawal from the EU therefore creates significant risks for rights protection and the effective functioning of the 1998 Agreement".[30]

The Joint Committee therefore made six recommendations "in order to honour the ongoing protection of rights on the island of Ireland":

1. Ensure that commitment to 'no diminution of rights' is evident and enforceable in the final Withdrawal Agreement.
2. Safeguard North-South equivalence of rights on an ongoing basis.
3. Guarantee equality of citizenship within Northern Ireland.
4. Protect border communities and migrant workers.
5. Ensure that evolving justice arrangements comply with the commitment to non-diminution of rights.
6. Ensure the continued right to participation in public life for EU citizens in Northern Ireland.[31]

If Northern Ireland does not stay within the ECHR, then a mechanism must be found to give effect to the GFA, and that mechanism must ensure that the people of Northern Ireland do not have a lower standard of rights protection than that available in the Republic. Prof. de Londras observes that:

"If people in Northern Ireland have a substantially lower standard of rights protection as a result of remedial inadequacy to that enjoyed (in Ireland) then there is a strong argument based in international law, that the UK is not fulfilling its commitments under the (GFA)".[32]

Closer consideration of the provisions of the GFA addressing a bill of rights in Northern Ireland[33] and a charter of rights for the island of Ireland as a whole[34] may, perhaps, provide a route to solving the urgent requirement for a replacement mechanism in the event of UK withdrawal from the ECHR and non-retention by the UK of the CFR.

The impact of UK withdrawal from the EU, without appropriate agreements and treaties, on not only the GFA but on the CTA and CJA is far reaching and profound. It is clear, however, that there is no shortage of careful academic analysis of recommended solutions that are required, accompanied by significant and authoritative recommendations from the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission. It is to be hoped that this guidance will be noted and will inform the negotiations and interaction that must follow.

To borrow a thought, in conclusion, from the narration by the Belfast-born actor Stephen Rea in a short film about Brexit and the border produced in September 2018:

"…roads that start here and end there, somehow allowing a wound to heal… a gentleness in the mundanity…daily travel across political lines; work, school, grocery shops, back again…there, but not there; a line of imagination that needed imagination to make it exist while unseen…we live here and we're holding our breath again".[35]

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12. TFEU, Article 267.
13. C-399/11 *Melloni v Ministerio Fiscal* [2013] 2 CMLR43, [54] (Grand Chamber, CJEU).
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18. The CFR also recognises the comparable ECHR rights as the baseline standard. EU CFR – Preamble and Articles 52(3) and 53.
19. Supreme Court [2017] IEHC 518.
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22. Para. 3 of the Preamble to the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland made the 10th day of April 1998.
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32. The Impact of Brexit on Human Rights – 2018 Annual Human Rights Lecture, Law Society of Ireland, May 15, 2018, page 10.
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The plight of the consumer in the Irish courts

Judgments in the Irish courts on consumer-related EU directives seem to diverge significantly from ECJ judgments on these issues.

Ken Bredin BL

Attempts to invoke consumer-oriented EU directives such as Directive 87/102/EEC on consumer credit and Directive 93/13/EEC on unfair terms in consumer contracts have been remarkably unsuccessful in Ireland to date. The lack of success in this jurisdiction is all the more striking when one considers the judgments delivered by the European Court of Justice (ECJ) on those directives and the corresponding success of litigants in other EU jurisdictions, which those judgments appear to record.

The lack of success in this jurisdiction clearly arises for a number of different reasons. What is noteworthy, however, is that a number of litigants have fallen at the very first hurdle, i.e., by failing to establish that they are a consumer for the purposes of the legislation that implements those directives. It is the view of the author that the test currently being applied in this jurisdiction in this regard is unduly restrictive, and is contrary to recent judgments of the ECJ on the matter. While this does not appear to be the only divergence between Irish law and EU law in this area, it is a significant one given that it concerns a gateway requirement of the legislation.

The Irish approach

The principal decision in this jurisdiction is *AIB plc v Higgins* [2010] IEHC 219. In that case the defendants obtained significant loan facilities totalling in excess of €6 million in order to acquire and develop lands into apartments and commercial and retail units. They subsequently defaulted on those facilities. However, on a motion for summary judgment they argued that they were consumers for the purposes of the Consumer Credit Act 1995 in entering into the loan agreements in circumstances where property investment/development was not their principal or main business. In this respect it was accepted for the purposes of the motion for judgment that each defendant had substantial and separate business interests that did not consist of property investment or development.

Nevertheless, Kelly J. readily concluded that the defendants were not consumers for the purposes of the Consumer Credit Act 1995. He rejected the submission of the defendants that a natural person may have just one business or trade or profession. He observed that this interpretation would have the most profound consequences in business and commercial life, as it would mean that every person who belonged to a trade or profession, and who decided to borrow money to invest in promoting another business with a view to profit, would have to be treated as a consumer in that regard. He held that the legislature could never have intended this without stating so in clear and unequivocal terms. He concluded that the defendants in this case had borrowed money as a partnership with a view to investing in property and its development for profit. In doing so, they engaged in a business and the Consumer Credit Act had no application to them.

It is the view of the author that the defendants in *AIB v Higgins* did not readily fit within any reasonable definition of a consumer – however broad that might be – and the conclusion reached was correct on the facts. However, in reaching his decision, Kelly J. also cited with approval a passage from the judgment of the ECJ in *Benincasa v Dentalkit* (Case C-269/95), to which he added emphasis (as below):

"It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, **a concept which must be strictly construed**, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not the subjective situation of the person concerned. As the Advocate General rightly observed in point 38 of his Opinion, **the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer** as the party deemed to be the weaker party economically. The specific protection sought to be

afforded by those provisions is unwarranted in the case of contract for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character".

The decision in *AIB v Higgins* and the passage from *Benincasa* have now been adopted and applied by the majority of decisions in this jurisdiction. Examples include *ACC Bank plc v McEllin* [2013] IEHC 454, *Allied Irish Banks plc v Fahy* [2014] IEHC 244, *McCambridge v Anglo Irish Bank Corporation Ltd* [2016] IEHC 327, *Allied Irish Banks plc v McGouran* [2016] IEHC 629, *Hogan v Deloitte* [2017] IEHC 673, *Barry v Ennis Property Finance DAC* [2018] IEHC 766, and *AIB Mortgage Bank v Gunning* [2018] IEHC 555. The concept of a consumer is interpreted strictly, and the contract at issue must be concluded for the purpose of satisfying an individual's own needs in terms of private consumption.

Open to question

It is the view of the author that this approach has led to some conclusions that are open to question. For example, in *Hogan v Deloitte* [2017] IEHC 673, the plaintiff inherited his parents' home in 2002 subject to a life interest in favour of his father. His father had incurred considerable debt as a result of his mother's end-of-life care, and the plaintiff took out a mortgage in 2005 to assist in relieving that debt while his father continued to reside in the property. His father subsequently died and the plaintiff thereafter let out the property. Stewart J. nevertheless rejected the submission that the plaintiff was a consumer for the purposes of this mortgage:

"By his own admission, the monies were not drawn down for the satisfaction of his own needs in terms of private consumption. They were drawn down and described as an investment loan. The plaintiff alleges he used some of the monies to provide for his elderly father. Following on from his father's death, the plaintiff rented out the secured property and has collected rent from it ever since. At no point were the loaned monies or the secured property ever used for private consumption, and so there can be no question that the plaintiff is a consumer".[1]

Although the High Court has on occasion rejected the proposition that the concept of a consumer is to be strictly construed, most notably in the judgment of Baker J. in *Stapleford Finance Ltd v Lavelle* [2016] IEHC 385 and – possibly – the decision of Barrett J. in *Ulster Bank Ireland Ltd v Healy* [2014] IEHC 96,[2] those decisions have themselves been distinguished and/or rejected in more recent judgments. Accordingly, in *McCambridge v Anglo Irish Bank Corporation Ltd* [2016] IEHC 327, O'Regan J. stated that: "Insofar as Barrett J. differs in his approach from Kelly J. as to who might qualify as a consumer under the relevant legislation, I adopt the approach of Kelly J., who in turn has adopted the approach of the European Court of Justice".[3] Similarly, in *Hogan v Deloitte* [2017] IEHC 673, Stewart J. stated:

"I would adopt Kelly P.'s review and assessment of the CJEU case law, as well as his and O'Regan J.'s position as to how the definition of a consumer is to be interpreted and applied. Although neither party relied upon or referred to it, this Court has read the decision of Baker J. in *Stapleford Finance Ltd v Lavelle* [2016] IEHC 385. That judgment was delivered in the context of an application to defend the entry of summary judgment and to allow the matter to proceed to a plenary hearing. Baker J. acceded to the application on the basis that the defendant had an arguable case that he was a consumer within the meaning of the Consumer Credit Act 1995. That case can be readily distinguished from the facts of the present case and, in my view, does not impact on the view the Court has to arrive in respect of this case".[4]

A different approach in Europe

The logic of applying the dicta of the ECJ in *Benincasa* to either Directive 87/102/EEC on consumer credit or Directive 93/13/EEC on unfair terms in consumer contracts – particularly the proposition that the concept of a consumer must be strictly construed – is not compelling. The decision in *Benincasa* concerned a jurisdiction dispute under the former Brussels Convention.[5] That Convention permitted a consumer in certain circumstances to issue proceedings in the country of his or her domicile instead of and by way of derogation from the general rule of jurisdiction that defendants are to be sued in their country of domicile. As derogations fall to be strictly construed, so too did the concept of a consumer in that context. The approach in *Benincasa* was subsequently repeated and applied in *Gruber v Bay Wa AG* (Case C-464-01), where the ECJ observed that:

"... the definition of a contract concluded by a consumer must be strictly interpreted as it constitutes a derogation from the basic rule of jurisdiction laid down in the first paragraph of Article 2, and confers exceptional jurisdiction on the courts of the claimant's domicile".

However, neither of the aforementioned consumer directives can properly be described or regarded as an exception or derogation, and the logic for adopting a strict interpretation of the definition of a consumer in that context is not at all apparent.

Three recent decisions of the ECJ (all delivered subsequent to the High Court decision in *Higgins*) have now considered the definition of a consumer in the context of Directive 93/13/EEC on unfair terms in consumer contracts. None of these decisions have suggested that a strict interpretation is required. On the contrary, in *Pouvin v Electricite de France* (Case C-590/17, judgment delivered March 21, 2019), the ECJ expressly stated to the contrary (albeit somewhat tersely):

"That broad definition of the concept of 'consumer', for the purposes of Article 2(b) of the Directive 93/13, allows the protection granted by that directive to all natural persons finding themselves in the weaker position referred to in paragraph 5 of the present judgment" (para.28).

The ECJ has also expressly confirmed that the concept of a 'seller or supplier' who is the other party to the contract must also be interpreted broadly for the purposes of Directive 93/13/EEC.[6]

It is perhaps striking that none of the recent decisions have even referred to the judgment in *Benincasa* or the test of private consumption that it puts forward. Instead they have adopted a test that is framed in more general terms. The focus appears to be less on whether it can unequivocally be said that the contract is to satisfy an individual's own needs in terms of private consumption, but instead on whether or not it can be said to relate to the litigant's trade, business or profession. Accordingly in *Costea v SC Volksbank Romania SA* (Case C-110/14, judgment delivered September 3, 2015), the ECJ stated:

"17. It is therefore by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the directive defines the contracts to which it applies".

The ECJ then proceeded to analyse the definition of a consumer in the following terms:

"21. The concept of 'consumer', within the meaning of Article 2(b) of Directive 93/13, is, as the Advocate General observes in points 28 to 33 of his Opinion, objective in nature and is distinct from the concrete knowledge the person in question may have, or from the information that person actually has.

22. A national court before which an action relating to a contract which may be covered by that directive has been brought is required to determine, taking into account all the evidence and in particular the terms of that contract, whether the purchaser may be characterised as a consumer within the meaning of that directive (see by analogy, judgment in *Faber*, C-497/13, EU:C:2015:357, paragraph 48).

23. In order to do that, the national court must take into account all the circumstances of the case, particularly the nature of the goods or service covered by the contract in question, capable of showing the purpose for which those goods or that service is being acquired".

Similar formulations of this test are found in both *Turcau v Banca Comerciala Intesa Sanpaolo Romania SA* (Case C-74/15, judgment delivered November 19, 2015), and *Pouvin v Electricite de France* (Case C-590/17).

Difference of emphasis

In the author's opinion, the test formulated in these decisions is ultimately more a difference of emphasis to the "private consumption" test rather than an entirely different approach. One must still assess the contract at issue, and the goods and services that are the subject of that contract. From this, one must still assess the purpose for which those goods and services are being acquired by the would-be consumer. However, while the dicta in *Benincasa* appears to focus on whether it can then be said that the goods were acquired for personal private consumption, the three recent decisions instead appear to focus on whether it can then be said that they were acquired for purposes connected to his or her trade, business or profession. It is a difference of emphasis – perhaps subtle – but an important difference nonetheless.

An example of this approach in practice is illustrated in *Costea v SC Volksbank Romania SA* (Case C-110/14, judgment delivered September 3, 2015). In this case the applicant was a practising lawyer specialising in commercial law who entered into a credit agreement for the stated purpose of personal current expenditure. The loan was secured by a guarantee and mortgage provided by his law firm over the business premises, with Mr Costea executing the relevant documentation on behalf of his law firm. Mr Costea sought to argue that a term relating to a periodic 'risk charge' payable under the credit agreement was unfair contrary to the Romanian legislation implementing Council Directive 93/13/EEC. The lender argued that Mr Costea, by reason of his professional expertise and experience, was not in a position of inequality *vis-à-vis* the lender, and was therefore not a consumer. They also argued that the fact that his law firm had secured the loan on their business premises took the transaction out of the consumer arena. The ECJ rejected both propositions:

"26. A lawyer who concludes, with a natural or legal person acting for purposes relating to his trade, business or profession, a contract which, particularly as it does not relate to the activity of his firm, is not linked to the exercise of the lawyer's profession, is, *vis-à-vis* that person, in the weaker position referred to in paragraph 18 of this judgment.

27. In such a situation, even if a lawyer were considered to display a high level of technical knowledge (see judgment in *Siba*, C-537/13, EU:C:015:14, point 23), he could not be assumed not to be a weak party compared with a seller or supplier. As has been noted in paragraph 18 of the present judgment, the weaker position of the consumer *vis-à-vis* the seller or supplier, which the system of protection implemented by Directive 93/13 is intended to remedy, relates both to the consumer's level of knowledge and to his bargaining power under terms drawn up in advance by the seller or supplier the content of which the consumer is unable to influence.

28. As regards the fact that the debt arising out of the contract in question is secured by a mortgage taken out by a lawyer in his capacity as representative of his law firm and involving goods intended for the exercise of that lawyer's profession, such as the building belonging to that firm, it should be held that, as the Advocate General observed, essentially, in points 52 to 54 of his Opinion, it has no bearing on the assessment carried out in paragraphs 22 and 23 of this judgment".

Conclusion

The current approach in this jurisdiction to the effect that the definition of a consumer is a concept that is required to be strictly interpreted as a matter of EU law for the purposes of the Consumer Credit Act 1995 and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 does not appear to be in line with the more recent EU case law. While there are clearly situations where the concept of a consumer is as a matter of EU law strictly construed and interpreted, e.g., jurisdiction disputes, that is not the case for the consumer directives that underlie the above legislation. Furthermore, the

test being applied in this jurisdiction to determine whether a person is a consumer for the purposes of those directives seems different both in strict formulation and emphasis to that which has been set out in the recent ECJ decisions, and seems to focus unduly on the private consumption aspect of the transaction.

The effect of this divergence should not be overstated. The conclusions reached in many, if not most of the cases in this jurisdiction, were nevertheless correct. As stated earlier, it is difficult to disagree with the conclusion reached in *AIB plc v Higgins* that persons who form a partnership and secure multimillion-Euro loan facilities in order to finance the construction of a large housing and retail development are not consumers by most if not all people's standards. However, some of the decisions on this subject are more open to question. In this context, it could be suggested that the Irish courts have yet to fully grapple with and determine how to treat a person who engages in one or two property investments of a modest nature in order to provide for his or her family into the future. It is perhaps surprising that an ECJ reference has not occurred in regard to what is in some respects a very Irish phenomenon of recent years. There must also now be a significant doubt as to whether the test that is currently applied to dual purposes contracts that have both a consumer aspect and a business or trade dimension remains correct in the context of the consumer directives, although the ECJ has yet to definitively rule on that issue.[7]

References

1. Para. 37.
2. Barrett J. did not purport to depart from *AIB v Higgins* and cited part of the passage from *Benincasa* in his judgment. However, his judgment has been perceived in subsequent judgments to adopt a lower threshold as to who might qualify as a consumer for the purposes of the legislation.
3. Para. 32.
4. Para. 36.
5. The definitions of a consumer in the Brussels Convention, Directive 87/102/EEC and Council Directive 93/13/EEC are grammatically very similar and effectively identical for analysis purposes.
6. *Karel De Grote v Kuijpers* (Case C-147/16). Judgment delivered November 30, 2017.
7. The current approach in this jurisdiction is that the business element of the contract must be negligible in order for it to remain a consumer contract – see *AIB plc v Fahey* [2014] IEHC 244, and the discussion in *AIB plc v Fahey* [2015] IEHC 334.

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The role of counsel in the administration of justice

The suggestion that counsel must ensure the veracity of a client's representations has enormous implications for the administration of justice.

Mary Rose Gearty SC
Chair of the Professional Practices Committee

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

The core job of a barrister is to present one side of an argument in order that the fact finder might reach a decision, based on the law and on that tribunal's findings of fact. It is not the role of counsel, unless she has clear knowledge that a client has made false representations in respect of a claim or defence, to reach a conclusion on the truth, as distinct from the credibility, of her instructions.

Where the truth lies

On issues of law, counsel may refuse to make an argument that has no reasonable chance of success. On issues of fact, which are peculiarly a matter for witnesses and for the decision maker, there is rarely a situation which will justify counsel in forming a concluded view as to where the truth lies so as to justify refusing to act for that client. The reason for the distinction is that counsel usually knows better than her client what the law is and how it applies to a given set of facts, whereas clients and witnesses usually know whether their evidence is true, but counsel will seldom know this. It is not the function of counsel to determine whether instructions are true, but to present one side of the case to the decision maker, in order to assist the decision-making process. This is our important contribution to the administration of justice.

Courts and other tribunals must sometimes determine truth, or probable truth, without being certain because, having heard all sides, that is necessary to the resolution of disputes. Counsel should refrain from making any such determination. It is not in her power to do so because counsel has not heard all sides when advising a client or presenting a case. Nor is it necessary that she should do so, because that is the function of the court.

The importance of fair representation

Most importantly, one of counsel's primary duties is to ensure that even apparently weak cases can be presented as well as possible. The ability of the system carefully to examine even a weak case, provided it is a stateable case in law and not demonstrably dishonest, is a key safeguard of a rational, evidence-based approach to justice.

Weak, even apparently implausible, cases sometimes turn out to be legitimate and those cases can prove very important. If, for instance, the reason for doubting the instructing party is based on a general assumption which itself may be the result of unconscious bias, where is the genuine party to find representation? It may be that the generally held bias comes against the client at every turn and she is presumed to be unreliable when in truth, she is not. This is to perpetuate the wrong by not allowing the client to make her case.

Our courts, historically, took the view that women and children were not reliable witnesses in certain types of cases and sought corroboration of their evidence. Such attitudes have long been discredited but the danger of inherent bias is that it is often unconscious. One of the most valuable attributes of the independent barrister is that she puts forward the argument on behalf of every client whose rights are in issue, be he good, bad or even morally ugly, so that a tribunal of fact can consider that argument and rule upon it.

A flawed narrative

If counsel were permitted to withdraw from cases because the credibility of their clients' evidence were put in doubt, it might be difficult to avoid counsel being made responsible to assess the truth of their clients' cases and, thus, for matters not under their control and outside their knowledge. This would usurp the functions of judges and other fact finders, put counsel's judgment in issue in every contested case, expose counsel to criticism whenever a case failed on the facts, and potentially create a conflict between clients and counsel. Ultimately, clients would have to find counsel who believed them.

In the case of suspicion, as distinct from knowledge, of dishonesty, this should not affect a client's legal team. If it did, who would defend those who are the subject of allegations of dishonesty? If it did, the allegation alone would ensure that the suspected thief or fraudster, whether in criminal or civil proceedings, would never find counsel willing to act, for fear counsel would be identified with his dishonesty, were such a determination made by the tribunal of fact.

The narrative that if an action fails, counsel should be criticised for presenting the case is flawed and seriously inimical to the interests of justice. Would counsel then be entitled to refuse to represent a litigant if not assured of success, or at least of the probity of her client? A chilling thought for decision makers, not just for members of the Bar.

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